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TOWARDS FRAMING THE CONSTITUTION OF INDIA

Towards Framing the Constitution of India

BY

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B. G. PRINTERS & PUBLISHERS LTD.,

3, MANGOE LANE, CALCUTTA 1.

Printed and Published by J. N. Bose at the Indian Press Limited,
93-A, Dharamtala Street, Calcutta.
Sponsored By B. G. Printers & Publishers Ltd.

First Impression—July, 1947

BY THE SAME AUTHOR

A MONOGRAPH ON THE SEPARATION OF EXECUTIVE AND JUDICIAL POWERS IN BRITISH INDIA

INDIAN CIVIL SERVICE

RURAL SELF-GOVERNMENT IN BENGAL.

THE CONSTITUTIONAL SYSTEM OF INDIA.

THE FEDERAL SYSTEM OF THE UNITED STATES OF AMERICA: A STUDY IN THE STATE RELATIONS.

CRITICAL STUDY OF SOME ASPECTS OF PUBLIC ADMINISTRATION IN BENGAL

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PREFACE

The Indian Constituent Assembly which was elected, according to the procedure laid down by the British Cabinet Mission in its Statement of May 16, 1946, met for the first time on December 9 of that year and is likely to finish its work of constitution-making by October next. The object of this book is, as the chapter headings may indicate, to discuss the implications of the Constituent Assembly as an instrument of framing a constitution, the experiences of other countries in this regard, the character of the Assembly set up in India, and the problems which this Assembly has not only to face but to solve satisfactorily so that the constitution it frames may help effectively in the conduct of public administration on an equitable and efficient basis. Such discussion has not, however, been an easy task in view of the changes which were introduced at short intervals in the principles underlying the composition and status of the Constituent Assembly.

It may be borne in mind that under the original proposals of the Cabinet Mission the Assembly was to be composed on a particular basis, act according to a particular procedure, and set up a constitutional machinery according to certain principles. The declaration which His Majesty's Government made on December 6, 1946 by way of interpreting the clause of the Cabinet Mission Statement as to the working of the Sections, modified this basis to a great extent. Then on February 20, 1947 Mr. Attlee made on behalf of His Majesty's Government a fresh declaration which foreshadowed the partition of India and which thereby weakened the basis of the Indian Constituent Assembly as an All-India body. This was again followed by the announce-

ment, on June 3, 1947, of the plan of transferring power to Indian hands. It actually provided for the division of India and the partition of some provinces as a solution of the communal problem. As a result of the implementation of this plan, the New Delhi Constituent Assembly will have its decisions binding only on those parts of India which will not be included in Pakistan.

These frequent changes made the planning of the book a difficult job. Grouping, for instance, was a basic factor of the constitutional scheme as laid down by the Cabinet Mission. Accordingly one chapter was included in the book for the discussion of the subject. But with the division of India and the establishment of Pakistan, 'grouping' has become a dead issue, so far as the provinces are concerned. Grouping among small Indian states is, however, a live issue and may continue to be so for sometime to come. The criticism made in regard to 'grouping' among provinces may help in understanding the issues involved in the grouping among these states. So the chapter comes out in this book as it was originally written. Again in the chapter on Union Powers, discussion was started on the basis of the proposals of the Cabinet Mission. These proposals are no longer operative and cannot limit the authority of the Constituent Assembly in regard to the jurisdiction it may confer upon the Union Government and in regard to the relations it may seek to establish between the Union and its provincial units. But as discussion in this chapter was alreaiy full and detailed, there was no necessity of modifying it in view of the ltered situation. Pakistan has now been conceded but rguments against its establishment remain as valid to-day s they were when it was a mere demand. Consequently, the hapter on Pakistan appears as it was originally intended to ppear.

Before I close this short preface, I acknowledge my obliation to Mr. K. L. Dey in regard to the publication of this

book, which, it is hoped, may help the interested public in appreciating in their proper perspective the tangled problems with which the Indian Constituent Assembly has been called upon to deal.

It should be added that the first chapter of the book was contributed to the Calcutta Review (January, 1947) and has been incorporated here practically without any change.

26th June, 1947
Asutosh Building,
University of Calcutta.

N. C. ROY.

CHAPTER I

CONSTITUENT ASSEMBLY

Early Experiences

On the 9th of December, 1946 was held the first meeting of the Union Constituent Assembly at New Delhi. Those who were present at the Assembly Hall that morning and watched the delegates from different provinces submitting their credentials and signing the ornamented Register were fully conscious of the importance and solemnity of the occasion and knew at heart that this meeting was a great landmark in the evolution of India from its state of absolute dependence upon an European island to its full maturity as an independent and sovereign nation. The very fact that this Assembly was sitting to determine the system of India's future governance was itself a recognition of the new stature of this country. All the previous fundamental laws providing for India's constitutional mechanism—from the Regulating Act of 1773 to the Government of India Act, 1935—were [redacted] statutes of the British Parliament. It is true that since 1919 representative Indians have been associated in a limited capacity with the framing of these laws. Indian witnesses appeared before and were heard by the Joint Parliamentary Committee on the Government of India Bill, 1919 and might have influenced in some details the shape of the Bill as it finally emerged.

The Statutory Commission appointed in 1927 and presided over by Sir John Simon was taken objection to by all sections of the Indian people on the ground that it was an all-white

body. Indian constitution was an affair of the Indian people and should be framed, if not exclusively by themselves, at least with their assistance and cooperation. An all-British Parliamentary Commission was, however, a violent negation of this principle and roused on this account unanimous opposition in the country. In order that Indian opinion might be conciliated and Indian objections at least partly met, it was then decided to hold Round Table Conferences at London. Later in the Joint Parliamentary Committee on the new Government of India Bill were also included several Indians as assessors and others appeared before it as witnesses. But when all this is said, it has to be admitted that the Act of 1935 was, as the Act of 1919 had been,essentially the handiwork of the British Government. The association of Indians with these enactments were more for spectacular than for other purposes. The convoking of the Constituent Assembly on December 9 last, therefore, marked the end of an epoch during which India's system of government was decided upon at Westminster and the beginning of another during which, in the words of the British Cabinet Misson, "a constitution can be settled by Indians for Indians".

The idea that a national assembly representing the sovereign will of the people should be called upon to form the constitution of the country was the contribution of the 18th century. It was first practised in the former American colonies of Britain and then taken up in earnest by the French people in Europe. In America the mind of the people was long saturated with the ideas which Locke had expounded with so much clarity nearly a century before. At the time of the declaration of independence it was, therefore, a commonplace in American thought that the foundation of all authority was the consent of the governed, that the government was to enjoy only limited and delegated powers and that if it exceeded the limits of its authority and overstepped the boundaries of its delegated powers it would be liable to

removal by the exercise of the will of the people. This idea was the central feature of that noble document, the Declaration of Independence, drafted by Jefferson. It was but inevitable on this account that when the colonies cut away from the British Empire and became free states, their constitutions should be framed through the exercise of the will of the people themselves. In fact John Adams pointed out that in the matter of framing the fundamental laws of the state the people "must be consulted, and we must realize the theories of the wisest writers, and invite the people to erect the whole building with their own hands, upon the broadest foundation."[1]

The actual procedure followed in the American states in regard to the framing of their constitutions was of course not uniform. In Virginia for instance the constitution was framed by the state legislature and inspite of Jefferson's warning it was not placed before the people for ratification. In Delaware a convention was specially chosen to frame the constitution and when its task was finished, the constitution so drafted was put into operation at once, without being submitted to the people for approval. In Massachusetts, however, not only a constitutional convention, directly chosen by the people, formulated the constitution but it did not go into effect until two-thirds of the town meetings approved of the draft. These three examples would show that although it was recognised that the will of the people was to be ascertained in the matter of framing the constitution, there was no one definite way of ascertaining it. When the legislature of the state of Virginia, which consisted of the representatives of the people, formulated the constitution, it was taken as the indirect handiwork of the people themselves. Gradually, however, ideas crystalised and the accepted method of framing a constitution was through a

[1]A. C. McLaughlin—A Constitutional History of the United States, p. 108.

specially elected constitutional conventin whose work was ordinarily to be submitted to and ratified by the people.

The Federal Convention which met in Philadelphia in May 1787, and finally drafted the constitution of the United States in September of the same year should not be regarded as a body representing the will of the people in the same sense as the National Assembly of France or the Frankfort Parliament of 1848 happened to be. It may rather be regarded as a convenient assembly of the delegates of several sovereign states, who did not come with the same instructions but who after exchanging the instructions of their respective governments and their own ideas and thoughts succeeded in hammering out a constitutional mechanism for a more stable and durable union of the states. It may be regarded as a constituent assembly only in the sense that it was drafting a constitution but it was neither a sovereign body itself like the British Parliament nor was it a body deriving its authority from the sovereign people. It is no doubt true that the constitution framed by this Convention began with "We, the people of the United States,...." But the fact is that at the time the Convention happened to meet and draft the constitution, there was no people of the United States. There were only thirteen peoples of thirteen states. After, of course, the constitution was ratified, they were united and became one. It was, therefore, appropriate that the Constitution after ratification should start with "We, the people of the United States...." But although it was not exactly a constituent assembly with full right of its own to frame the fundamental and constituent laws of the country, it proved in practice to be an effective instrument for formulating an agreed constitution in peculiarly difficult circumstances. We may, therefore, dwell for a while on the composition of this body and the procedure of work it followed.

The thirteen sovereign American states had by 1881 adop-

ted the Articles of Confederation and entered into a Union which was, however, too loose in character and which did not ensure the performance of important common functions on the Union basis. Trade with other countries and trade among the several states ought for instance to have been regulated by the common Confederate authority. But the Articles of Confederation did not allow any such regulation to be undertaken by the Congress. The result was as unhappy as it might be expected. So it was proposed that the different states would appoint Commissioners and they would meet at Annapolis in 1886 and "take into consideration the trade of the United States". Actually only five states were represented in this trade convention. In course of the discussion which these Commissioners had in this truncated convention, they became impressed by the many defects in the existing system of Union—defects which rendered "the situation of the United States delicate and critical". So they suggested that their respective states should "use their endeavours to procure the concurrence of the other States, in the Appointment of Commissioners to meet at Philadelphia on the second Monday in May next, to take into Consideration the situation of the United States to devise such further Provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress Assembled, as when 'agreed to by them and afterwards confirmed by the Legislatures of every State' will effectually provide for the same."[2] The Congress which was the organ of the existing Union approved of the scheme and adopted on February 21, 1787, a resolution in favour of the proposed convention.

Most of the States appointed their delegates before the day fixed for the first meeting but some appointed them

[2]Taken from Max Farrand—The Framing of the Constitution p. 10.

afterwards. Only one state, namely Rhode Island, refused to take part in the Convention and did not appoint delegates. The delegates appointed by the states were not in number the same in every case. Nor were their instructions identical. Virginia for instance authorised any three of its seven delegates to join with the deputies from other states "in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Federal Constitution adequate to the Exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress as when agreed to by them duly confirmed by the several States will effectually provide for the same." Delaware issued the same commission to its delegates but with the important proviso "that such Alterations or further Provisions, or any of them, do not extend to that part of the Fifth Article of the Confederation ... which declares that 'In determining Questions in the United States in Congress Assembled each State shall have one Vote' ". It should be here emphasised that although the instructions to the Delaware deputies were definite in this regard, ultimately the Convention made a great compromise on this important and even vital question. The manner of appointing the delegates was also not uniform. Most were selected by their state legislatures but some were nominated by the State Governor.

Total number of delegates appointed to the Convention at Philadelphia was seventy-four. But actually fifty-five attended and thirty-nine of them signed the document which embodied the results of their labour for four months. The delegates were mostly men of experience and had been connected with one or another form of public activity. One writer draws our attention to the fact that thirty-nine of the delegates had served in Congress, eight had signed the Declaration of Independence, eight had helped in forming state constitutions, five had been members of the Annapolis

trade convention, seven had been chief executives of their states and twenty-nine had fought in the Revolution. Jefferson, when apprised of the appointments made to the Convention, wrote to John Adams that "it really is an assembly of demigods".[3] But neither from the antecedents of the delegates referred to above nor from the eulogy of Jefferson it should be inferred that all those appointed to the Convention were the best and the most suitable men available in the different states for the kind of work that awaited them at Philadelphia.

The delegation from Virginia which for a generation enjoyed in more than one sense the leadership of the United States was of course particularly well chosen and included such great names as George Washington, James Madison, Edmund Randolph, George Wythe and John Blair. Jefferson, when he made the observation in his letter to Adams, possibly did it with his eyes upon this list of delegates from his own state. Men of light and leading came from other states as well. References should certainly be made to such names as Benjamin Franklin, James Wilson and Gouverneur Morris who came from Pennsylvania, John Dickinson, the author of the Farmer's Letters who came from Delaware, Alexander Hamilton who came from New York, William Paterson who came from New Jersey and William Samuel Johnson who came from Connecticut. But while able, experienced and suitable men were chosen for the Convention, it is equally true that there were others sent to Philadelphia who were not as able or as desirable. In fact the assembly which framed the Constitution of the United States consisted, like other assemblies, of men both great and small. It was significant of the Philadelphia Convention that its leading men were really great and they towered so high as to succeed ultimately in getting over the petty obstructions which

[3] *Ibid* p. 39.

petty men placed in their way and in drafting an agreed constitution which has made the United States what it is to-day.

Although the Convention was scheduled to meet on the second Monday of May 1787, only a few delegates arrived by that date and it was not till Friday, the 25th May, 1787 that the Convention happened to meet formally for the first time. But the delegates who had already reached Philadelphia by the appointed date or a little later naturally held discussions among themselves and evidently chalked out informally the procedure according to which work of the Convention was to be carried on. In pursuance of it when the Convention met for the first time, it proceeded immediately to elect its President. In this particular the Constituent Assembly which met at New Delhi on the 9th of December last did not follow the example of the Federal Convention of the United States. It followed the practice of the local bodies and legislative assemblies in this country. It allowed itself to be presided over by a temporary chairman when the members submitted their credentials and when later the permanent President was elected. The Federal Convention at Philadelphia, it should be repeated, did not have the formality of a temporary chairman. As it met for the first time, it proceeded at once to elect its President. It should be remembered that the Convention was meeting at the headquarters of the state of Pennsylvania whose Governor, Benjamin Franklin, was a member of the Convention. So courtesy demanded that he should be elected to this office without contest. Besides, it should be remembered, Franklin was a man respected throughout America not only for the varied experiences of his life but for the great knowledge and wisdom which he was reputed to possess.

But he was now eighty-one and his powers were failing. So the idea of electing this "American Socrates" to the presidentship of the Convention was ruled out and George Wash-

ington who was now only fifty-five and at the height of his popularity in the country was elected to the chair. It is significant that in the absence of Franklin who could not be present because of inclement weather, his name was proposed on behalf of the Pennsylvania delegation by Robert Morris and when elected he was formally conducted to the chair by his proposer and another member of the same delegation. After this formal inaugural, Washington offered the assembly his thanks for the honour conferred upon him and then plunged into business the first item of which was the election of a Secretary. Major William Jackson who was not a member of the Convention but had experience of public work was elected to this office. With the appointment of the President and Secretary the Convention was now in working order. So next the credentials of the delegates were read and thereafter a committee of three was elected to prepare the standing orders and rules.

The Convention which was itself of the size of a committee had to tackle most of the problems which faced it either through the Committee of the Whole House or through several small committees. The Committee of Eleven was for instance responsible for the compromise effected between the two rival view-points as regards representation of the states in the federal legislature. Then there was the Committee of Detail which rendered such great service. On the seventeenth of September after four months of arduous labour the work was at last finished and the draft signed. Robert Morris who had proposed Washington to the chair observed in referring to the finished document that "while some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain, honest men, and such, I think, it will appear". Farrand who edited the records with such care, wrote: "Neither a work of divine origin, nor "the greatest work that was ever struck off at a given

time by the brain and purpose of man", but a practical, workable document is this constitution of the United States"[4] But the draft, before it would become the supreme law of the land, had to go through important other formalities. It was first transmitted to the Confederate Congress which very promptly (on the 28th September 1787) but without any words of commendation referred it to the legislatures of the states so that by them it might be submitted to the state conventions specially elected for the purpose.

So in these conventions again the work that had already been done with so much energy and care had again to be defended with equal skill and pertinacity. It is significant that even those delegates who had opposed without success the acceptance of the draft by the Federal Convention took their defeat in a sporting manner and now came out to support it in the conventions of their states. Alexander Hamilton who had signed the draft no doubt but who, it was common knowledge, had no enthusiasm for it as he had asked for a more centralised system, now took up his formidable pen in collaboration with James Madison and John Jay in support of the document so that the essays which they would produce and which are still to be read with profit and pleasure in the *Federalist* might influence the members of the convention of the crucial state of New York in favour of the work done at Philadelphia. In fact without the influential and strenuous support which he gave at this stage, it is doubtful if the New York Convention would have adopted the draft and without New York supporting the scheme of the Federal Union, it would have fallen through. In any event the constitution as framed by the Convention at Philadelphia became the fundamental law of the American Union only through its acceptance by the state conventions elected specifically for its consideration by them. In other words,

[4] *Ibid*, p. 210.

it should be emphasised again, the Philadelphia Convention, though constituted in a formal maner, was not a constituent assembly of the nation but a body of accredited representatives of different sovereign entities and the work which these representatives did in this assembly had to be approved by their respective states in a specific manner before it became legally valid and practically effective.

The French National Assembly which acted as a constituent body for two years and set up the first constitution in the revolutionary era acted as the immediate representative of the sovereign nation and in that capacity drafted a constitution which went at once into effect with the King's consent. The King, though no longer regarded as the repository of the nation's sovereignty which was now taken as being vested in the people, had still an important part to play as an integral factor of the Government. The idea of referring the work of an assembly to the people for ratification had not yet become popular. In fact the representatives of the third estate also had been elected only indirectly by the people. So once the constitution was drafted and adopted by the Constituent Assembly and once it was approved of by the King, it was put into effect without any other formality. The tradition of framing a constitution through a constituent assembly has been maintained ever sice. There is only this difference, as evidenced in recent constitution-making in France, that the constitution adopted by the Assembly has to be submitted to the people for ratification, although this Assembly might have been elected with this purpose mainly in view. We say *mainly* because the Assembly which in France drafted the constitution for the Fourth Republic was made responsible also for supervising the day to day adiministration during the tenure of its office.

This was also in line with French tradition. The first Constituent Assembly (1789-1791) was largely but not exclusively concerned with the framing of the new constitution.

It acted also as the ordinary legislative and deliberative body of the realm during this period. In this particular the French tradition is different from the idea which is ordinarily entertained about the functions of the Constituent Assembly. It seems really desirable that constituent and ordinary legislative and deliberative functions should be kept distinct and the body which is to frame an original constitution should not be burdened with other duties. In France, of course, combination of the two functions in the same Assembly was the oly practical solution of the problem which faced the people either in 1789 or in 1945-46. But wherever feasible, the Constituent Assembly should be concerned with framing the constitution alone. In respect of amending the constitution in details, of course, the ordinary legislature may be allowed to function for this purpose. But if the amendments are really of a far-reaching character, it is desirable that instead of ordinary legislatures, conventions specifically elected for the purpose should consider and adopt them. The fathers of the United States Constitution did well in this regard by providing for more than one method of amending the constitution.

It was the problem of finance which impelled the King of France to summon the States-General in August 1788. This body, though an ancient institution, had not met since 1614. But so deplorable were really the conditions of finance that all opinion was insistent on its being summoned. Accordingly, it may be repeated, the States-General was summoned in August 1788 to meet in following May. Formerly this body which consisted of three estates would meet in three divisions and it was looked forward to by people around the throne that on this occasion also it would meet on the same basis and the nobility and the clergy would have opportunity of voting down the third estate or the Commons. But much water had passed down the Seine since the States-General had assembled last. New forces were now at work and a new

spirit had overtaken the mind of the people. The total number of deputies returned in 1789 was 1139, of whom 291 represented the clergy, 270 the nobility and 578 the third estate. Every attempt to separate the estates, and get business done according to old procedure was foiled. "It was not", the Commoners informed the King, "three separate assemblies of three orders that Your Majesty summoned here, but the National Assembly, to busy itself with Your Majesty, in the regeneration of the realm." In fact the representatives of the third estate did not regard themselves as being returned only on behalf of that estate but on behalf of the nation. So whatever attitude the representatives of the clergy and the nobility might take up, they would have actually no locus standi except as members of the assembly in which the Commoners were in the majority. They would give up their separate identity and participate in the deliberations of this assembly or they would be deprived altogether of any voice in the affairs of the nation. So what was summoned as a States-General became the assembled nation or the National Assembly representing the general will of the people of France and was empowered thereby not only to take into consideration the immediate affairs of the government and the country but also the system of future governance of France.

Sylvain Bailly who was chosen to preside over this National Assembly and guide its deliberations in more than one critical moment was a remarkable man from every standpoint. His father had been hereditary Keeper of the King's pictures at the Louvre. "He had graduated in art and literature, before devoting his mature talents to astronomy. A monograph on the satellites of Jupiter, and a controversy with Voltaire, earned him the membership of three Academies, and a reputation for orthodoxy which was hardly shaken by the suspicion that he doubted the literal truth of Genesis".[5] At

[5]J. M. Thompson—The French Revolution, p. 29.

the age of fifty-two he threw up this distinguished scientific career in order to free himself for politics. At first he devoted himself to the work of the Paris Municipality and in the following year (1889) he was returned to the States-General as a deputy for the third estate of Paris. His great reputation as a scientist and his undoubted knowledge of the rules and procedure for the conduct of debate in a deliberative body marked him out for the Mayoralty of Paris as for the first Presidency of the National Assembly. Apart from the first President, there were other resourceful and first rate men in the Assembly who determined the great part which it happened to play during the two years of its existence.

The first name to cite is that of Emmanuel-Joseph Sieyes. "Forced against his will into a clerical career by poor and pious parents, he consoled himself with political philosophy and music".[6] He was now only forty-one. But already he had acquired some experience of politics and administration and what was more he had established himself as a writer of great power. In fact he wielded an inspired pen. It was he who impressed not only upon the representatives of the third estate but upon the great body of thinking people outside that France was so far an aristocracy, that the third estate counted for nothing, that it should count hitherto for something and that the general will of the people, expressed in a national assembly, could and ought to draw up a constitution which would define and limit the powers of the government. Needless to say, the opinion so clearly expressed was readily adopted by the commons and translated with promptitude into action. Sieyes was not unfortunately as good a speaker as he was as a writer. In fact on his legs he was as uneloquent as ungraceful. That may explain that his reputation in the National Assembly was rivalled and exceeded

[6] *Ibid*, p. 28.

by others. He did not reach the height of his power till later days.

Another name was that of Mirabeau. It is not necessary to say much about him. "Resembling Wilkes" observed Macaulay, "in the lower and grosser parts of his character, he had, in his higher qualities, some affinity to Chatham". In fact he was a mixture of opposites. A powerful writer, a great speaker and a masterful personality, he had also aspects of life, venal, corrupt and disreputable. But he was the man of the hour. In extraordinary circumstances a conventional man may be unsuited and unsuitable and a masterful man, though corrupt and undesirable in some aspects, may force his way to the front. That Mirabeau did. It is again not exactly correct to think, as many have thought, that the French National Assembly which became the Constituent Assembly consisted of several men of first rate ability and the rest were impractical visionaries. Actually on analysis of the membership of the third estate it has been found that although lawyers predominated, being fifty percent of the total strength, there were also administrators, tradesmen, landed proprietors, agriculturists, clergymen, doctors and officers of the army and navy. Even lawyers also "were men of action and men of affairs".[7] In their professional capacity they had to come into touch with practical conditions of the people and the country and think of reforms which might be practical and appropriate.

It was the Assembly so led and composed, which, as it has been pointed out already, not only discussed and decided upon the day to day affairs of the country but framed in the course of the next two years the constitution under which France was to be governed. It is unfortunate that the course of events, after it had finished its work, was such as to submerge this work and to lead France to other chan-

[7] *Ibid.* p. 27.

nels of thought and activity. Possibly by imposing upon themselves the self-denying ordinance that the members of the Constituent Assembly would not seek election to the new legislature, they made a mistake of the first magnitude as it deprived this new legislature of all men of experience and moderation which was born of experience. In any event the fact was that an assembly representing the general will of the people of France took upon itself the function of formulating its fundamental laws, and it must be said that the laws so formulated were neither ill-balanced nor inequitable.

The precedent created in France of the constitution being framed by a national assembly was followed in the same country in 1848 when the July Monarchy was overturned by the third Revolution. As Louis Philippe and members of his family were bundled out of the country, a provisional government undertook the administration for France. This body, nine hundred strong, was returned by manhood suffrage and met on the 27th of April, 1848. The assembly returned in 1789 and the assembly elected about sixty years later were illustrations of the fact that French leaders and people had a liking for large bodies where all shades of thought might have opportunity of representation and where every project might be discussed from all angles. They appeared to believe that for adopting a constitution as for deciding upon ordinary legislative measures the advantages of a large assembly outweighed its defects. It should also be emphasised that as in 1789-91 so in 1848 what the national assembly did was final. The constitution drafted by this body did not require the formality of further reference to the people; it went immediately into effect and elections under the new constitution were held in December of the same year. The national assembly was elected by the people with the definite mandate of drafting the constitution as also with the authority of supervising the administration during its tenure of office. Consequently when the constitution was drafted,

it was not thought necessary that there should be the formality of any fresh reference to the people but went into effect at once.

The constitution, so launched, proved very short-lived. Louis Napoleon made it a stepping-stone to power and then kicked it into thin air and established the second Empire. For this the national assembly has been blamed. It had made the President directly elective by universal suffrage and had not provided for his subordination to the legislative assembly. The result was that by courting the electors the President soon made himself an independent head of the state and then there was but an easy step from the President to the Emperor. The question is to what extent the national assembly might actually be held responsible for this eventuality. There was no doubt about it that in view of the traditions of the country no arrangement should have been made which brought the President into such close touch with universal suffrage. It is significant that in all subsequent constitution-making France has avoided this blunder and both under the third and under the fourth Republic the President has been elective by the national assembly. But if in 1848 the national assembly failed to realise the explosive possibility of popular election of the President, for that the method of drafting the constitution through such a body could not be regarded as unwise. Possibly a far smaller body than an assembly of nine hundred might have better opportunity of thinking out the problems beforehand more dispassionately.

The revolution which swept away the July Monarchy in France had repercussions also in Germany. "In March, 1848, the revolutionary wave broke over Germany with such force that resistance was hardly dreamed of". The problem facing the revolutionaries was two-fold in this country. They were to democratise the administration of the different states and at the same time to unify the country and establish a suitable federal government for the whole of

Germany. It was thought that the nationalist movement had struck its root so deeply in the German soil that the establishment of this federation and the organisation of the federal government were less a matter of negotiations among the different state governments and more a matter of decision by the representatives of the German people meeting in a constituent assembly or national parliament. To this end, therefore, the German nationalist and revolutionary leaders proceeded to work. The initiative was taken by a group of Heidelberg patriots and invitations were issued to "all previous or present members of the diets and participants in assemblies of lawgivers all over Germany". Individual invitations were also sent out and in several places ordinary public meetings elected persons as their representatives. So the assembly was constituted and it met at Frankfort not as the national parliament but to prepare the way for such a body. It was on this account known as the Pre-Parliament. There was a suggestion no doubt that this Pre-Parliament itself should be duly declared as the Constituent Assembly but it was turned down and a resolution was adopted to the effect "that the decision on the future constitution of Germany should rest solely and entirely with the National Assembly, to be elected by the people". In other words it would be for the people of Germany to decide upon the questions of German unification and the system of German government. The Princes and their Governments would have nothing to do with them.

The Pre-Parliament set up a committee of Fifty to prepare for the elections, which were duly held and the National Assembly (or the German Parliament) met in May 1848. It ultimately consisted of five hundred members most of whom, as it might be expected in 1848, came from the upper strata of society. Academic life, the legal profession, local and state administration and the church were all represented in an adequate degree. It is significant that there were in this

Assembly forty-nine University Professors and doctors,fifty-seven teachers of higher schools, one hundred and fifty-seven judges and procurators and sixty-six other lawyers. This explains why one writer actually observed that "the Frankfort Parliament was too much of a university and too little of a political stock exchange". Its President was also characteristically Heinrich von Gagern, a former civil servant and later Prime Minister of the small state of Hesse-Darmstadt. Early in life he had declared himself first a German and then a Hessian. A fine figure, he had an effective voice and a dignified and chivalrous bearing. In fact "there was in his nature something powerful and manly". His speeches were also clear and expressive but they were not unoften too abstract, too universal and too pompous. In this the speeches not only represented the man but the Assembly of which he was the President. This body was no doubt, as a writer has reminded us, "the proud daughter of the people, the national will, the sovereign of sovereigns". But this "sovereign of sovereigns" was only temporarily awakened to its functions and responsibilities.

The revolutionary movement had roused it from its sleep but there was no knowing when it would go back to that sleep. So the sanction behind the Assembly was a precarious one. In fact by the time it held its first meeting, the counter revolution had already begun. In view of this fact its leaders, if they were far-seeing statesmen and not mere doctrinaire politicians, would have struck the iron while it was hot and fashioned the constitution for united Germany while the people's voice still counted for something. But like Gagern, their President, the members including their leaders believed more in abstract arguments than in speedy action. A considerable time was spent in the discussion and formulation of the fundamental rights of citizens and when at last they were prepared, the revolutionary fire had already been largely extinguished and when after nearly a year's work

the constitution itself was framed, the people were no longer "the sovereign of sovereigns". Nothing consequently came out of the efforts of these eleven months. "The German people acclaimed and reverenced their National Assembly of 1848 as a Goddess of Liberty, only to let this goddess die a year later 'like a street woman in the gutter'."[8] The failure of this Frankfort Parliament which was convoked with so much enthusiasm, hope, and confidence is a warning that a constituent assembly whose only sanction is the public opinion behind it can succeed only if that public opinion is sufficiently strong to withstand the opposition which is sure to be organised by the vested interests. Framing the constitution by a representative assembly elected for the purpose is a democratic process which can be effective only if democracy is powerful. In the case of Germany of 1848 it was strong only for a while but as the work of the Assembly proceeded, it was increasingly submerged by the vested interests of state particularism and other reactionary forces.

[8]Veit Valentin—1848: Chapters of German History (translated by E. T. Scheuffauer). p. 263.

CHAPTER II

CONSTITUENT ASSEMBLY

Experiences in the British Dominions.

The methods observed in the framing of federal constitutions in Canada and Australia and in the adoption of the constitution of the Irish Free State (now Eire) were different from those described in the preceding pages. There was, of course, no deviation in these instances from the principle that the constitution under which the government is to be run must have the approval of the people concerned. But, in view of the fact that the British Parliament was the legal sovereign of these territories, it was necessary that the machinery of constitution-making was to be so arranged as to make the constitution finally emanate from this body. Besides, at the time the provinces in British North America were united into the Dominion of Canada, the British Parliament had divested itself of its direct sovereign control over colonial affairs only recently and the tradition of looking to Westminster for inspiration, guidance and even supervision had not completely died out.

In fact responsible government in the Canadian provinces was then only about twenty years old. So it may be said that while the new tradition of doing nothing in British North America without the consent of the local people had grown up, the old tradition of British Parliamentary supervision and control was not altogether dead. It was, therefore, decided at first that if a scheme of union had the support of the different colonial legislatures, it would be placed before Her Majesty's Government which would introduce it in the form of a bill in Parliament with of course such

amendments as it thought justifiable and as would have the consent of the Canadian representatives. Actually the scheme which Her Majesty's Government considered and introduced in Parliament had the express approval of only the Canadian legislature. But it had the approval of the delegates of two other colonies as well, though their legislatures had failed to approve of it when it was placed before them. So what the British Parliament insisted on at the time of the passing of the B.N.A. Act was that the federal scheme should have approval of those colonies which would be included in the union. It did not matter how that approval was expressed. Details were these.

Ontario and Quebec had been united into one province under the Act of 1840 and responsible government had been experimented there since the days of Elgin. But the two races inhabiting the two parts of the united province were still deeply suspicious of each other and consequently deadlock in administration had become chronic. Exploration of different avenues of escape out of this grave difficulty became necessary and one of the possible ways out was a Canadian federation in which Ontario and Quebec would again become separate provinces, but with jurisdiction only over subjects of provincial importance, while matters of common concern would be handed over to the federal government. In the Maritime Provinces also the idea was gaining ground that isolation was not ensuring fuller life which the people desired. Local leaders were also not satisfied with the part they had opportunity of playing in their sparsely populated colonies. They looked forward to a wider arena in which they might exercise their talent of leadership.

That the people of British North America did not count for much in the new continent and far less in the wider world was also a cause for irritation in many circles. So long as the different provinces would remain separate and plough their lonely furrow with connection only with Great Britain

but without any other ties with one another, there was no chance of their position being improved and their status augmented. Consequently there was necessity for a union or a federation so that in matters of external importance all the provinces might speak with one voice. With the start of the Civil War in the United States and the consequent growth of sympathy in British circles for the cause of the Southern Confederacy, the attitude of the North in the U. S. A. became increasingly hostile towards the British and the Trent affair even made an Anglo-American war possible. In the face of this contingency the desire among the people in British North America to grow stronger than they were became stimulated and the idea of a federation became strengthened*.

The situation could in fact be met only by a federation among all the provinces of British North America. But at first the idea of having two federations—one between the two provinces of Canada and the other among the Maritime Provinces—was not ruled out. Circumstances, however, so shaped themselves ultimately as to make possible a federation which would include not only the two Canadian provinces but some of the Maritime Provinces as well. Negotiations in this connection were started under the authority of a letter which the Secretary of State for Colonies, the Duke of Newcastle, had written to the Lieutenant-Governor of Nova Scotia on July 6, 1862 and which had been communicated to the Governor-General of Canada on the same day by the Colonial Office. In this letter the Colonial Secretary had observed: "I should see no objection to any consultation on the subject (amalgamation of part, or all, of the British Provinces in North America) amongst the leading members of the Governments concerned; but whatever the result of such consultation might be, the most satisfactory mode of testing the opinion of the

*There is an excellent chapter on the *Growth of the Federation Idea* in W. P. M. Kennedy—The Constitution of Canada.

people of British North America would probably be by means of resolution or address, proposed in the Legislature of each Province by its own Government". The initiative under the authority of this letter was taken by the Government of Nova Scotia, the object in view being a union of the Maritime Provinces. Accordingly the King's speech opening the General Assembly of that colony on the 4th February, 1864 referred to this subject of union among the three provinces and on the 29th March following, an address was presented by the Legislature to the Administrator, who was then in charge of the province, for the appointment of delegates so that they might confer with such delegates appointed by the other two Governments in regard to an union among the Maritime Provinces.

When the proposal of a union among the Maritime Provinces so mooted appeared to mature, Lord Monck, the Governor-General of Canada, wrote a letter (on the 30th of June, 1864) to the Adminstrator of Nova Scotia informing him of the desire of the Canadian Government to send a delegation to the Conference, the object being to ascertain whether the proposed union might not "embrace the whole of the British North American Provinces". To this communication a favourable reply was received. But as the delegates of the three Maritime Provinces would be appointed for the express purpose of a union among those provinces alone, the conference with the Canadian delegation would have to be of an informal character. The Canadian Government naturally agreed to this condition and decided at first to send a delegation of four Ministers to the Conference, which, it was decided, would be held at Charlottetown. Actually when the Conferenec opened, the Canadian delegation consisted of as many as eight members—all Ministers. It should, of course, be remembered in this connection that in order that the possibilities of some kind of a union might be satisfactorily explored the Canadian Ministry had at this

time become a coalition one. So the question of the opposition being included in the delegation did not arise . Among those who attended were John A. Macdonald, G. E. Cartier, George Brown and A. T. Galt. The three Maritime Provinces were each of them represented by five delegates, three being Ministers and two being chosen from the opposition.

The Conference, consisting only of the delegates of the three Maritime Provinces, met for the first time on the 1st of September, 1864, and, after the election of J. H. Gray of Prince Edward Island as Chairman and Charles Tupper of Nova Scotia and S. L. Tilley of New Brunswick as Secretaries, spent some time in preliminary general discussion. That over, the Conference decided to receive the deputation from the Government of Canada "who had arrived for the purpose of explaining to the Conference the views of that Government upon the Union of British North America." "The Conference met separately, and with these gentlemen daily, until Wednesday, the 7th of September, and full and free discussion took place between them and the members of the Conference. Upon the 7th September, at the invitation of the Delegates from Nova Scotia, the Conference was adjourned to meet at Halifax, where, on the 10th September, it was reassembled at the Legislative Council Chamber, and the discussions continued with the members of the Canadian Government. On the 12th upon the invitation of the Delegates from New Brunswick, the Conference was adjourned to meet at St. John, N.B.

"Previous to adjournment, the Hon. J. A. Macdonald announced to the Conference that the Executive Council of Canada would advise His Excellency the Governor-General to invite the Lieutenant-Governors of Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, to appoint Delegates to attend a Conference at Quebec, to take

formally into consideration the subject of a Union of all the B.N.A. Provinces.

"Pursuant to the adjournment the Conference met at Stubbs' Hotel at St. John, N.B., on the 16th September. when it was decided to adjourn until after the Conference to be called at Quebec had formally discussed the larger question in all its bearings".

It is interesting to recall that this adjourned meeting was duly held at the Queen's Hotel, Toronto, C.W., on the 3rd November, when it was resolved,—

"That in view of the Resolutions passed at the Quebec Conference in favour of a Confederation of the British North American Provinces, this Conference decide to postpone the consideration of the question of a Legislative Union of the Maritime Provinces and that the Joint Secretaries be requested to draw up a report of the proceedings of the Conference for the information of the Lieutenant-Governors and of the Legislatures of the Maritime Provinces". This done. the Conference adjourned sine die.[1]

Meanwhile preparations were made for the Conference to be held at Quebec. On the 23rd September, 1864. a Committee of the Executive Council of Canada submitted a report to the Governor-General regarding the work that had been done at Charlottetown and advised him to invite the Governments of other provinces of British North America to appoint delegates to the Conference which would discuss the subject of a Union of all these provinces. The report was as follows:

"....it was thought desirable by the Conference (at Charlottetown) that the subject should be resumed in a formal and official manner under the authority of the Governments of the several Provinces.

[1]See Report to the Hon'ble the Speaker of the Senate of Canada by the Parliamentary Counsel, 1939. Annex. 2. pp. 32-33.

"The Committee have, therefore, the honour to advise and submit for Your Excellency's approval, that the several Governments of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland be invited to appoint Delegates under the authority of the Despatch of the Secretary for Colonies to the Lieutenant-Governor of Nova Scotia, dated 6th July, 1862, and communicted by the Colonial Office to Your Excellency by a Despatch of the same date, to confer with the Canadian Government on the subject of a Union or Federation of the British North American Provinces."[2]

Accordingly on the same day, 23rd September 1864, the Governor-General, Lord Monck, wrote the Lieutenant-Governors of the several provinces inviting them to send delegates to the Conference to be held at Quebec on the 10th of October following. He also informed the Secretary for Colonies in London as to the action he was taking and the latter approved of such action in a communication dated the 14th October, 1864. On receipt of this invitation the different provinces appointed delegates. It is on record that the Lieutenant-Governor of Nova Scotia had written to the Secretary of State for Colonies for permission to this effect. As the letter of the Secretary of State giving him this required permission was dated 1st October and would not reach him in time, the Lieutenant-Governor as advised by the Ministry appointed the delegates without receiving the previous approval from London. As the Governor General of Canada who was issuing the invitation was constitutionally the Governor-in-Chief for Nova Scotia as well, the Lieutenant-Governor justified his conduct on the ground that although approval from London had not yet arrived, he was obeying his superior officer by appointing the delegates. In any event, as it turned out, the different provincial govern-

[2] *Ibid*, p. 21.

ments appointed their delegates with the full approval of Whitehall and these delegates met at a Conference at Quebec on the 10th October 1864.

The delegates who assembled at Quebec numbered thirty-three and were for the most part the same as had met at Charlottetown. Nova Scotia for instance sent the same delegation without any modification. Prince Edward Island added two more names while Newfoundland which had not taken any part in the previous Conference now appointed two members, one being the Speaker of the local Assembly. As for Canada, the Prime Minister, Sir E. P. Taché, who, now an aged man, had refrained from attending the Charlottetown Conference, personally led the Canadian delegation at Quebec and was chosen by the members of the Conference as its Chairman. As many as five members were elected Joint Secretaries of the Conference and on the nomination of these Secretaries the Conference elected H. Bernard as the Executive Secretary. The Conference thus organised proceeded to tackle the problems of a federation among the provinces of British North America. It should only be emphasised here that the delegates who were now at work represented the best political experience of the territories whose destiny was now to be shaped on a new basis.

The Conference, it may be recalled, had been called "to consider the question of a Union of these Colonies and to digest a scheme for the practical realization of the idea, which may be submitted as embodying the joint opinions of the Governments of the several Provinces to the Secretary of State for the Colonies, with a view to obtaining his sanction for legislation on the subject." So the body which met at Quebec on the 10th October 1864 under the Chairmanship of Sir E. P. Taché, the Prime Minister of Canada, was not technically a constituent assembly as we understand it. First, it was not the elect of any sovereign people and did not re-

present its will except in an indirect way in the matter of framing the constitution under which that people would be governed in the future. It, on the contrary, consisted of delegates of five governments of five disjointed colonies who had assembled there for an agreement in respect of some kind of union. Secondly, what the Conference at Quebec would accomplish would not automatically be put into operation as the national constitution of the country. Its decisions would first be submitted to the different provincial legislatures for approval and then as such approval would be forth-coming, they would have to be placed before the British Government at London. Finally, this latter Government would introduce the scheme in the form of a bill in British Parliament. The Bill passed by this Parliament would be the Act enshrining the constitution for working out whose principles and details the Conference at Quebec was called.

It did not, however, matter whether the Quebec Conference was a mere conference or a constituent assembly. The fact is that the delegates who attended it were practical statesmen with a vision as to the future greatness of Canada and the work they did was soon proved to be of permanent value although immediately after it was accomplished the prospects turned out to be rather gloomy. The Conference, it may be repeated, met on the 10th October, 1864 at Quebec and deliberated there at length until the 27th of that month. On that day it adjourned to Montreal and there the final meeting was held on the 29th October. " At this meeting it was unanimously resolved that the various Delegates should present the annexed Report as the common result at which the Conference had arrived, and which it was agreed should be authenticated by the signatures of all the Members."[3] That there was a good deal of unanimity among the dele-

[3]Ibid. Letter, dated Dec. 5, 1864, of Nova Scotian Delegates to Lt. Governor.

gates as to the objectives they had in view was evidenced by the fact that within so short a period the Conference succeeded in framing a document of seventy-two resolutions and in securing the assent to it of those present. It was certainly a great achievement.

The scene now shifted to the provincial legislatures and to Whitehall. According to the conditions set forth in the Duke of Newcastle's letter of 1862, the scheme of union formulated at Quebec had to be submitted to the legislatures of the provinces concerned. In February 1865, the two houses of the Canadian legislature discussed the resolutions and adopted them by large majorities in March of the same year. This was to the credit as much of the general body of members as to the leaders who sponsored the resolutions in effective statesmanlike speeches. It is significant that by way of avoiding any amendments which might otherwise be moved, Sir John Macdonald pointed out in course of his able speech that "these resolutions were in the nature of a treaty and if not adopted in their entirety the proceedings would have to be commenced *de novo*."

That the resolutions represented an agreement between the delegates of several provincial governments was a fact and it was equally a fact that any amendment modifying the resolutions would be a violation of that agreement. But the emphasis which Sir John laid upon this aspect of the question was taken advantage of in later years by those who claimed that the Canadian Constitution was the result of a compact among the provinces and consequently without the consent of all the provinces it could not be amended and modified. But whatever might happen in the future, in the winter of 1865 the speech proved effective. Not that there were no dissentient voices. In fact it was pointed out by some that the resolutions ought to have been placed before the people and no change in the status of the

province should be brought about without the direct approval of the electorate. The plea was, however, rejected on the ground that the by-elections recently held were positively an indication that the electorate had full approval of what the Government was proceeding to do.

While in the province of Canada the scheme formulated at Quebec had full approval of the legislature, in the Maritime Provinces they met with a different reception. In New Brunswick the existing legislature was dissolved and in the new elections which were held soon after, an overwhelming majority hostile to the scheme was returned with the consequence which only could have been expected. In Nova Scotia the example of New Brunswick had a deleterious effect and those who had put their signatures to the Quebec scheme were themselves constrained to walk more warily. They virtually threw overboard that scheme and persuaded the legislature to vote in favour of a smaller union among the Maritime Provinces alone. In Prince Edward Island circumstances turned out to be still more unfavourable to the Quebec resolutions and the legislature there turned them down. In Newfoundland also public opinion became hostile to the resolutions and the general election, held there after the Quebec Conference, went against the scheme.

But although the results of the Quebec Conference apparently met with this sorry fate, there was really no stalemate as might have been expected under the circumstances. Fresh discussions were soon undertaken and that, rather strangely, on the basis of the resolutions adopted at Quebec. The venue, however, now shifted to London. It is also important to note that although the Quebec resolutions became the basis of discussion here, only one province, e.g., Canada, had resolved to present an address to Her Majesty "praying that she may be graciously pleased to cause

a measure to be submitted to the Imperial Parliament, for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, in one Government, with provisions based on the following resolutions, which were adopted at a Conference of Delegates from the said Colonies, held at the city of Quebec on the tenth of October, 1864." The Lieutenant-Governor of Nova Scotia had on the contrary observed in a communication to the Secretary of State for Colonies (dated 9th January, 1865) that "it is better for these Provinces to avail themselves of the friendly arbitrament of the Queen's Government and send Delegates to consult with the latter during preparation of the proposed Imperial Bill.....the simplest and most effectual mode of serving these Provinces is to confide in the wisdom, discretion, and friendly disposition of the Imperial Government."

In other words the Bill which would be introduced in the Parliament at Westminster would not be based upon the Quebec Resolutions but its shape would depend upon the "wisdom, discretion and friendly disposition" of her Majesty's Government in London. The legislature of Nova Scotia saw eye to eye with the Lieutenant-Governor of the Province. This is illustrated by the fact that it adopted a motion authorising the appointment of delegates to London "to arrange with the Imperial Government a scheme of union." The House of Assembly of New Brunswick also adopted a resolution authorising the appointment of delegates "to unite with the delegates from the other provinces in arranging with the Imperial Government for the union of British North America...." These terms of appointment of delegates to London indicate only thing, e.g., that the work of the Quebec Conference might be ignored altogether, if necessary, but if convenient, they might be the basis of discussion for the Bill. The Quebec Conference was thus treated only as an advisory body which had done spade

work and not as a constituent assembly, whose decisions were binding.

Three Provinces sent delegates to London. Canada sent six, Nova Scotia and New Brunswick five each. At first, conferences were held (4th Decmeber, 1866) .among these delegates alone under the chairmanship of the chief Canadian delegate, Sir John Macdonald, who was elected to this office by the delegates assembled. At later stages the Conference was presided over by the Colonial Secretary, Lord Carnarvon. As the resolutions adopted at Quebec represented considerable agreement among the provinces as to the kind of union to be set up, they became as a matter of convenience the basis of discussion. It is, however, significant that the bill as it emerged out of these discussions deviated in many particulars from the seventy-two Quebec resolutions. It was this agreed bill which was submitteed to and passed by Parliament.[4]

The Commonwealth of Australia Act which embodies the federal constitution of that Dominion was passed by the British Parliament in 1900 and was put into operation early in the following year. This Act had not only the support of a movement for union in the Australian colonies which had a history of fifty years behind it but had been shaped in Australia according to a method which may be acclaimed as the most democratic. Its principles and details had been discussed threadbare for well over a decade and given final shape by a convention which had been directly elected by the people of the several colonies. When again the framework was thus prepared by a body specially commissioned with this responsibility, it was placed before the people of the colonies again for approval, and when such aproval was at last obtained, it was submitted to Her Majesty's Government in London. There it was slightly amended no doubt before

[4] *Ibid*, Annex 4, pp. 22-77.

introduction in Parliament but even this was done with the approval of the accredited representatives of the colonies concerned. So the study of the procedure followed in Australia in respect of framing its Commonwealth Constitution is more interesting than the study of the procedure followed for the same purpose in Canada. It should, of course, be remembered that there was a time lag of thirty years between the adoption of the British North America Act and that of the Commonwealth of Australia Act. This is important in view of the progress of responsible government during the intervening period.

So while the representatives of the Governments of several provinces in British North America could come together for the purpose of exploring the possibilities of a union only under the authority of a letter of the British Colonial Secretary and with his approval, in Australia the several Governments acted on their own although some British Governors lent their helping hand but only in their personal capacity. In British North America again the Governments of several provinces backed out of the agreed resolutions which were adopted at Quebec by the joint efforts of the delegates of all the Governments and sent representatives to London so that there by direct negotiations with Her Majesty's Government they might achieve what they wanted. In Australia, however, there was no such pathetic confidence in the British Government and unjustified mistrust of their own efforts. The Australian representatives in London in 1900 took in fact their stand on what they had brought from their country and conceded only what was indispensable for the formal passage of the Bill through the Parliament. In 1866-67, however, except the delegates from Canada none of the representatives of British North America in London had any mandate to make the Quebec resolutions the basis of discussion and far less the basis of decision and action. In fact those from Nova Scotia and

New Brunswick had come to start discussions *de novo*. It was only for convenience that the work done at Quebec was taken up as the basis.

Before we proceed to study the details of Australian efforts in framing its constitution, it is pertinent to refer here to the fact that in the colonies of Canada and Australia as in the U.S.A. in 1787-88 the population for whose interests and with whose co-operation the constitutions were being formulated was very small. In the U.S.A. at the time of the Philadelphia Convention the population was less than four million. In British North America in 1864-67 it was about three million and seventy thousand and in Australia in 1900 it was three million and a half. Civilisation was everywhere simple and divergences of interests small. Localism was, of course, in all the three countries quite strong and in Canada particularly racial separatism was also keen. But in Australia even this complicating factor was absent and that made constitution-making more simple than anywhere else. But even then, as it has been pointed out already, a federal movement had to be carried on, though rather intermittently, for fifty years and during the last phase intense efforts had to be made for a decade before localism could be conquered and victory of federalism could be achieved.

It was in 1850 that Earl Grey, then Colonial Secretary, made an earnest effort in appreciation of the needs of the Australian colonies for the establishment of a General Assembly and a general executive. The efforts, however, practically failed, although in 1851 the head of the Government of New South Wales was made the Governor-General of all the Australian colonies. This unifying experiment was short-lived and was abandoned in 1861. Attempts made under local auspices, e.g., on the initiative of Gavan Duffy were no more successful. But still off and on such efforts continued to be made. During the twenty years previous

to the Melbourne Conference of 1890, the man who appreciated most the necessity of an Australian union and never ceased to work for it was Sir Henry Parkes who dominated the politics of New South Wales for years and was its Premier several times. Born a Warwickshire peasant, he had no opportunity of any schooling. He himself once observed to a friend after reading a biography of Gladstone: "When he was at Eton preparing himself for Oxford, enjoying the advantages of a good education, with plenty of money, and being trained in every way for his future position as a statesman, I was working at a rope-walk at four-pence a day....and when Mr. Gladstone was at Oxford I was breaking stones on the Queen's highway, with hardly enough clothing to protect me from cold".[5] But in Australia he found opportunities of a public career which he fully utilised and his natural abilities had full play in this pioneer world. An orator of no mean repute in that age of oratorical flourishes, he never failed to make an effective appeal to the imagination of the people whenever he had an opportunity of addressing them. He saw vision of a fuller and more fruitful Australian life under a common government and tried to place it before other people and convince statesmen of the neighbouring colonies of the utility of a union.

His efforts were, however, successful only to this extent that in 1885 the Federal Council of Australia Act was passed. The Council consisted of the representatives of the Governments of those colonies which allowed themselves to be associated with it and became its members. So it was not by any standard a legislature proper, although it had legislative power in certain fields. It would meet every two years and would have no power either to levy taxes or to spend money on its own in respect of any project. It had itself

[5]B. R. Wise—The Making of the Australian Commonwealth, p. 20.

no executive power, nor was any separate federal executive authority set up. It was, therefore, only natural that Sir Henry Parkes who was working so zealously for united Australia would have no enthusiasm for this body and would characterise it as a rickety institution. He even thought that it would be ridiculous for any colony to join it and work it. Accordingly it is significant that his own colony of New South Wales, the most important in the Australian continent, remained out of it throughout its uneventful career. In fact after ten years of slight activity, the Federal Council came virtually to be ignored by all. It became after 1895 overshadowed by the Conferences of Premiers and died a slow unlamented death.

Meanwhile circumstances appeared to demand the establishment of some form of a full-fledged union in Australia with a legislature and an executive of its own. Apart from such important questions as trade and tariff which called for a uniform policy and a common administration, there loomed large in the later eighties the question of defence. In October 1889, Major-General Edwards who had been commissioned by the British Government to look into the problems of Australian defence submitted his report in which he recommended the establishment of a central Australian authority for managing the affairs of defence for all the colonies. As common organisation of defence again presupposed the uniformity of railway gauge, it was urgent that the railway systems in the Australian colonies should also come under the jurisdiction of the same central authority.

The question now was whether the Federal Council which had already been set up might be so developed as to make itself useful in regard to these new responsibilities or whether this organisation should be scrapped and a full-blooded federal scheme should be formulated. In this respect we find there were two opinions. Already before the publication of the Edwards Report, Sir Henry Parkes had

written confidentially to Duncan Gillies, Premier of Victoria, suggesting that the time had arrived for creating "a Federal Parliament and Executive with complete authority, upon the lines of the Dominion of Canada". Mr. Gillies, however, wrote in reply to say that such a proposal was chimerical as also it was unnecessary. It was unnecessary because the Federal Council already existed and it provided the machinery for concerted action. So what Sir Henry should do was to persuade his own colony to become a member of this body and help in making this Council an effective instrument of common action.

This rebuff did not stop Sir Henry Parkes from making further efforts. An opportunity came with the publication of the Report of Major-General Edwards on October 9, 1889. Six days later, he despatched a circular telegram to the premiers of the other Australian colonies inviting them to a conference for the consideration of the Report. Again Gillies, the Premier of Victoria, replied for all to say that any conference which would ignore the Federal Council and would try to build *de novo* would not have their support and would be barren of results. Still not discouraged, Parkes proceeded to Brisbane, Queensland, and contacted the Premier and leader of the opposition of that Colony. But the Queensland Cabinet did not commit itself. So nothing appeared to come out of the persistent efforts made by Sir Henry Parkes for a federal union in Australia. On his return journey to Sydney, he, however, made a speech at Tenterfield which created a good deal of impression on the audience. But the proposal of a conference continued to hang fire. It was at this stage that the Governor of New South Wales, Lord Carrington, lent a helping hand. "Regardless of precedent he opened a correspondence with the Colonial Office and the other Governors, which had considerable influence in creating a more just appreciation of the new

situation."[6] In fact Lord Carrington's letter to Sir Henry Loch, the Governor of Victoria, helped a good deal in disarming the opposition of that Colony to a conference.

So at last on February 6, 1890 it met at Melbourne. Although a conference of Ministers, it included in its membership the leaders of the opposition of Queensland and South Australia and the Speaker of Western Australia. It was a small body of thirteen but included such great names of Australia as Sir Henry Parkes, Sir Samuel Griffith and Mr. Deakin. Mr. Duncan Gillies, Premier of Victoria in whose capital the Conference was being held, was elected in the first meeting as its chairman. It is significant that although the Conference was intended to be an exploratory one and its chief business was "to exchange ideas as to how far Federation is practicable at the present time",[7] still the proceedings were thrown open to the public and the press. This was done on the motion of Sir Henry Parkes. In course of the debates which followed much heat was naturally generated, as it could be expected when views diametrically opposite would be expressed by different members. But finally the Conference expreseed itself in favour of an early Union and a resolution was adopted to the effect that the members of the Conference would take such steps as might be necessary to induce the legislatures of their respective Colonies to appoint seven delegates each to a national Australian convention during the year so that this convention might consider and report upon an adequate scheme for a federal constitution.

The National Australasian Convention met in Sydney on March 2, 1891. The delegates, as the Melbourne Conference had provided, were elected by the legislatures of the several Colonies, each house electing a portion of the

[6] *Ibid*, p. 24.
[7] This was the observation of Sir Samuel Griffith, leader of the opposition in Queensland.

delegation. The Convention thus set up was also a small body, smaller than the Federal Convention which shaped the United States Constitution at Philadelphia. But it included representatives of both the Government and the Opposition Parties and among the delegates were not only all the Prime Ministers of the Australian Colonies but nine others who had held the Premiership in former Governments. All the political experience and wisdom available in the island continent were at the disposal of the Convention. Besides, both as the Premier of the Colony in whose capital the Convention was being held and as the "immediate author of the present movement", Sir Henry Parkes was elected to the chair. This naturally proved to be a great asset to the Convention. Sir Henry again, though occupying the chair, actually acted as the leader of the assembly and it was he who introduced the resolutions upon which there was a full discussion from all points of view. These resolutions laid down the principles which would underlie the federal constitution of Australia.

Accordingly when these resolutions were adopted by the Convention, it appointed three committees. The first one which was to consist of three members from each delegation was to consider the constitutional machinery. The second one was to consist of one member from each delegation and consider finance, taxation, and trade regulations. The third one was also to cosist of one member from each delegation and to deal with the judiciary. The second and third committees were to report to the first committee, which was to prepare the detailed constitution in the form of a bill and submit it to the Convention. The preparation of this draft was wisely entrusted to a small sub-committee of four members—Sir Samuel Griffith, Mr. Kingston, Mr. (later Sir Edmund) Barton, and Mr. Inglis Clerk. By March 29, finishing touches were given to the Bill as framed and on the 31st of the same month the report of the Constitu-

tional Committee together with the draft bill was brought before the Convention which accepted it without material alteration. The Sydney Convention thus accomplished its task very quickly. It finished drafting the federal constitution of Australia in six weeks while the Philadelphia Convention had taken four months of incessant work in framing the federal constitution of the United States. But the statesmen at Sydney had before them the example of work done by statesmen at Philadelphia and at Quebec and further they had before them the experiences of those who actually worked the federal constitutions in the U.S.A. and Canada. This certainly shortened their labour. But that they performed their task with both wisdom and precision is illustrated by the fact that when finally the Commonwealth of Australia Act was passed nine years later, it did not differ in any substantial point from the draft prepared at Sydney. That the work of the Convention was finished so quickly and with such celerity was unexpected in view of the known conflict of views among the delegates. But constant association of six weeks had on the delegates a wonderful effect. Mind reacted on mind and the angularities and pre-conceived views were to a great extent blunted and a common ground was easily found.

But the work as a result of which federation "had come down from the clouds to the earth" and "it changed from a dream into a tangible reality" was practically thrown away, though only for the present. A constitution framed on the authority of delegates who had been elected only by the legislatures was not regarded as embodying the will of the people. It was necessary that the Bill should be submitted to the people of the Colonies for their approval. But provisions to that end must be made by the colonial parliaments. To this effect a resolution was carried in the Convention and this proved to be the undoing of what had been achieved there during its six weeks' session. Public

opinion as represented in the legislatures was moving slower than the delegates they had appointed to the Sydney Convention. Each legislature decided to discuss the Bill threadbare and submit it to the people for approval only after they themselves had approved of it. But this procedure proved to be the stumbling block. If of course the legislature of New South Wales adopted the Bill promptly and had it approved by the people of that Colony without delay, its action might have been an example for the other Colonies to follow.

But Sir Henry Parkes was no longer his former self. On May 18, 1890 he had met with a serious accident, being thrown out of a runaway cab and at the great age at which he had already arrived (he was within a few days of his seventy-sixth birthday), the shock undermined his physical vitality and sapped his former strength and resolution of mind. It is true that after four months he appeared to have recovered and resumed his duties as Premier and leader. He also presided over the Sydney Convention tactfully and ably but his strength was ebbing away. He did not retire immediately because of the insistence of the Governor who scented financial difficulties ahead and wanted the old warrior to remain at the helm of affairs. But there was no doubt about it that he lost grip over the situation. So the sands ran out. The legislature now took up discussion of the Bill but as opposition thickened, other issues were allowed to take precedence. Finally nothing was done. Sir Henry practically retired in October 1891 from active public life. What New South Wales could not achieve the other Colonies had not the enthusiasm to do. Some legislatures discussed the Bill while the others did not even do that. In any event the scheme miscarried and for several years to come the issue, though not dead, was not exactly live. Other matters engrossed the attention of the people and federation was rather out of practical politics, thought not completely out of the public mind.

With the practical retirement of Sir Henry Parkes from the active direction of the federal movement, his mantle fell upon Mr. (later Sir Edmund) Barton who in 1901 became the first Prime Minister of the Australian Commonwealth. When the Constitution Bill framed by the Sydney Convention failed to make any progress through the colonial legislatures, an organisation known as the Federal League was set up on the initiative of one Edward Wilson but soon Mr. Barton became its leader and through the many branches of this organisation he found it possible to undertake intensive propaganda work in favour of the federal movement. The League was not an advocate of any particular form of federation. Nor was its work very sensational. But, in the words of Mr. R. R. Garran, its history "shows a record of steady organising and educating work", so that as a result of its activities the people themselves came to take a keener interest in the federal movement.

Ideas began to crystalise that in the future the procedure of constituting the federal convention should be different from what it was in 1890-91. Dr. (later Sir John) Quick actually suggested early in 1894 that each Colony should simultaneously pass an Act providing that the existing voters should elect ten representatives in each Colony to a federal Congress, that this Congress should frame a federal constitution, that the constitution so framed should be referred on a particular day to the voters in each Colony for acceptance or rejection and that if the constitution was accepted in two or more Colonies, it should be forwarded to the Imperial Government for implementation. The Federal League, however, amended this procedure proposed by Dr. Quick. The amendment was to the effect that each Colony should at first elect a provincial Convention to formulate its proposals for a federal constitution. These proposals should be submitted to a Federal Convention which would be elected by the Colonial Parliaments. This body would frame a federal consti-

tution by harmonising the proposals made by the different provincial bodies and the constitution so framed would be referred to the popular vote for acceptance or rejection.

A Conference of Premiers of different Australian Colonies, held in January 1895, did not find the proposals of the Federal League acceptable but largely adopted the original proposals of Dr. Quick and suggested that a convention consisting of ten representatives of each Colony, elected directly by the voters, should be commissioned to frame a federal constitution, that the constitution so framed should be submitted to the electors for acceptance or rejection and that if the electors of three or more colonies accepted the scheme, it should be transmitted to the Queen by an address from the Parliaments of those Colonies for the necessary legislative enactment. But in order that the voters in each Colony might proceed to elect the ten representatives to the proposed convention, an enabling act had to be passed by its legislature. These suggestions were neither promptly accepted by the colonial legislatures nor were they accepted finally by all of them in the same form.

In fact, Queensland refused to pass the enabling act, while Western Australia decided to elect the representatives not by direct vote but through its legislature. It was also decided that the constitution framed by the Convention to be accepted by a Colony must receive the support of a minimum number of voters. At last in March 1897, two years after the Premiers' Conference had made the suggestions, the elections were held and on the 22nd of the same month, the Convention held its first session at Adelaide. Mr. Kingston, the Premier of South Australia, was elected President and Mr. Barton who had done so much through his Federal League to slough off the indifference of the people towards the federal question, was elected Leader of the Convention. Among the notable absentees from this final constitution-making body were Sir Henry Parkes who had died in April,

1896 and Sir Samuel Griffith who was in "tranquil eminence of the judicial bench".

As in the Convention of 1891, three Committees were constituted at Adelaide as well and finally a Drafting Committee consisting of three members with Sir Edmund Barton at their head was set up. The Draft Bill prepared by this Committee was considered for some time by the Convention before it adjourned on April 23 so that meanwhile the Bill might be considered in the colonial legislatures and amendments suggested. The adjourned Convention then met in September 1897 in Sydney where, however, the work could not be finished although deliberations were continued for three weeks. Consequently in January, 1898 there was another session at Melbourne and this was contiued till the middle of March so that the tangled problems might be finally settled there and the Bill made ready for reference to the people. But this referendum proved to be a difficult business and it almost seemed that the race would ingloriously end at this final hurdle. Three Colonies of Victoria, Tasmania and South Australia voted for the Bill in large majority and under the arrangement the Bill which had thus the support of three Colonies might be forwarded to the Queen for legislative enactment.

But a federation of Australian Colonies without New South Wales being included was an impossible proposition just as a federation of the American States would have been absurd in 1789 if New York had decided to abstain. Its legislature had laid down the rule, though in an unreasonable manner, that at least eighty thousand voters must approve of the Federal Bill by way of signifying the Colony's approval of the scheme. But in June 1898 only seventy-one thousand and five hundred electors cast their votes in favour of the Federal Bill. Efforts were now made to persuade New South Wales to revise this decision even by making some concessions to its succeptibilities. Actually the legislature of

the Colony met and suggested some slight amendments in some important particulars of the Bill. A Conference of Premiers was again held in January 1899 to take into consideration these suggested amendments. It is interesting to observe that Queensland which had held aloof from the Federal Convention now joined this Conference, which agreed upon certain amendments of the Federal Bill. Consequently a fresh referendum had to be made in all the Colonies except Western Australia which held it only after the Bill had received the Queen's assent. The other five Colonies, however, accepted the measure by the requisite number of votes.

Referendum over, the legislatures of the five Colonies which had approved of the Bill adopted addresses to the Crown praying for its enactment. The Secretary of State for Colonies on receipt of them invited an Australian delegation to meet him and the law officers of the Crown so that any objections the latter might raise as to one or another clause of the Bill might be dealt with without any difficulty and the Bill might be introduced in Parliament without delay. Accordingly, five representatives of the five approving Colonies proceeded to London and there they were immediately confronted with the objection of the law officers particularly regarding the clause which prohibited appeals to the Crown in constitutional cases. The delegates at first took the ground that as the clause represented an agreement among the Colonies, it could not be amended at that stage. But as this did not disarm opposition and as meanwhile Australian public opinion appeared to support Her Majesty's Government, a Conference of Premiers held at Melbourne grudgingly permitted an amendment of the clause on a compromise basis. This difficulty over, the Bill was introduced in Parliament, quickly passed by it and received Royal assent on the 9th July, 1900.

The details enumerated above would show that neither in the Dominion of Canada nor in the Commonwealth of Australia the federal constitution was formulated by what

may be technically described as a constituent assembly. The decision of such an assembly as representing the will of the sovereign people is to go into effect at once. It is really to become a sovereign body by itself and consequently any constitution bill adopted by it becomes law without the intervention of any other body. But though technically the federal constitution of Australia was not framed by a constituent assembly, the method adopted there was more akin to that of the constituent assembly than the procedure followed in Canada. In the latter country, it should be remembered, the delegates of Nova Scotia and New Brunswick had no mandate to stand by the proposals adopted at Quebec and in fact they had gone to London with the intention of starting independent negotiations with Her Majesty's Government.

In Australia, however, not only the Federal Convention was directly elected by the people but the Bill adopted by it was ultimately enacted by the British Parliament. There were, however, limitations upon the powers of the Federal Convention. First, the Bill framed by it required the approval of the electorate. This by itself would not amount to any serious limitation upon the constituent assembly method. It might be said that the ultimate sovereign, the people, had delegated the function of framing the constitution to the Convention but had retained the right of approving or rejecting its work. But it should be recalled that it was the colonial legislatures which laid down the number of voters who must approve of the federal Bill. What was more, this number once decided upon was again varied by the New South Wales legislature. It should also be remembered that when requisite voting support in New South Wales was not available for the Bill, it was amended in some important particulars by a Conference of Premiers in the light of the suggestions made by one colonial legislature. Thirdly, the Bill was again modified in London and the modification was approved, though grudgingly, by another Premiers' Con-

ference. So the Convention played certainly an important part in the making of the Commonwealth Constitution but it was not a sovereign part. Technically it could not be described as a constituent assembly but only as a constitutional advisory body—to advise the people of the Australian Colonies in the matter of forming the federal union. But though this was the principal adviser, the people had other advisers as well, the legislatures of the Colonies and the Premiers' Conferences.

In comparison with the elaborate arrangements which had to be made in Canada and Australia for the framing of the federal constitutions in those Dominions, the formulation and promulgation of the Constitution of the Irish Free State may appear to be a simple affair. It should, however, be known that while the projects of the Canadian and Australian federation were discussed on a constitutional basis for years before such projects attained fruition, the affairs of Ireland were dealt with for more than one hundred years now in a constitutional and now in a violent manner. The Treaty of December 6, 1921 which was the basis of the new status and new constitution of the Irish Free State was itself the result of a violent conflict into the details of which it is not pertinent here to enter. So what appears to be a simple procedure has behind it a long complicated history. In any event the fact is that on December 6, 1921 a delegation consisting of seven members on behalf of the British Government in Great Britain and a delegation consisting of six members on behalf of the Government of the Irish Republic signed an Agreement of eighteen Articles "for a Treaty between Great Britain and Ireland." The legislative ratification of this Treaty was effected in Britain by the passing of the Irish Free State (Agreement) Act of March 31, 1922 and similar ratification was secured in Ireland by the passing of the Constitution of the Irish Free State Act of the same year.

The Treaty Agreement which made elaborate provisions

as to the constitutional status of the Irish Free State, the relations in which it would stand to the King, the mode of appointing the Governor-General, the relations which should subsist between the Irish Free State and the British Parliament and Government, the oath to be taken by the members of the Irish Parliament etc might itself be regarded after its ratification in the two countries as the fundamental law of Ireland and with this law as the basis conventions and customs might be developed, and the government might be carried on according to them. This was in fact the argument of those who thought that there was no need of any new written constitution for the Irish Free State. There were, however, others who wanted to fill in the details by the formulation of such a constitution. The latter view prevailed and a Constitution Committee was accordingly set up with Michael Collins, the head of the Provisional Government, as its Chairman. This Committee was given one month's time to prepare a draft. Actually it prepared three alternative drafts out of which the Provisional Government prepared a final one. It is significant that before this draft was made public and thrown open to discussion, it was forwarded to London for examination and approval by the British Law Officers. This prior consultation of the British Government was not enjoined by the Treaty but as the Constitution finally adopted by the Irish Free State must be consistent with the provisions of the Treaty Agreement and approved by the British Parliament, it was thought wise to take this preliminary step. As it turned out, the draft was objected to by the Law Officers of the Crown in respect of certain points and revised accordingly.

In June 1922 new elections were held in the Irish Free State and the new Parliament so returned became the Constituent Assembly. But as civil war now broke out, the Assembly could not meet before September. Even then the Republican members abstained but in their absence the work

of constitution-making was undertaken and finished in five weeks' time. Introduced on September 18, 1922 the Constitution Bill obtained the final approval of the Assembly on October 25 following. This Bill was discussed and approved more or less according to the same procedure as is followed in a legislative chamber in the case of an ordinary bill. There is again one interesting feature of voting in the Assembly. Those provisions of the Constitution Bill which were concerned with the interpretation of the Treaty Agreement of December 6, 1921 and with the safeguards for minorities were treated in the Assembly for voting purposes in the same way as a Government Bill is treated. In other words members of the Government and their supporters would be required to vote for them. But in respect of other provisions of the Bill voting was open. Even members of the Government might and did take opposite sides. The Bill so passed was forwarded to London where the British Parliament endorsed it by the passing of the Irish Free State Constitution Act, 1922. This done, a Royal Proclamation was issued by way of announcing that the new Constitution was coming into operation. [8]

We have detailed above the procedure followed in different countries in framing their constitutions and in forging thereby in certain cases a union of divergent interests. In several instances the efforts which were made proved abortive and even when they temporarily succeeded, the success they attained was only short-lived. In several other instances again these efforts became successful only after initial failure. In India a distinguished person[9] once observed that experiences of other countries point definitely to the conclusion that constituent assemblies elected by popular suffrage were not the right instrument of constitution-making particularly when

[8] Leo Kohn—The Constitution of the Irish Free State, pp. 49-89.

[9] Sir Maurice Gwyer in his Convocation Address at the Benares Hindu University.

the question of harmonising divergent and even hostile interests was involved. He deprecated in fact the procedure followed in 1789-91 in Paris, in 1848 in Frankfort and after the 1st World War in Weimar. He commended at the same time the procedure adopted in the British Dominions. But, this standpoint is hardly tenable in view of the experiences narrated in the foregoing paragraphs and pages. Successful constitution-framing is largely dependent upon certain external and some internal circumstances. When these circumstances are favourable, the constitution is not only easily framed but can be operated with ease and celerity as well.

If, however, they are unfavourable, all efforts collapse. The French Constitution set up by the Constituent Assembly did not culminate in committees of public safety because it was framed by a popularly elected Constituent Assembly but because of the internal and external circumstances over which this Assembly had hardly any control. The Frankfort Parliament ended in smoke not because it was a body popularly elected, nor because it was a large assembly but first on the ground that its leaders had not the necessary experience of such work and secondly, and more strongly on the ground that revolutionary fever subsided and the Princes and the reactionary forces which supported the old order had opportunity of reasserting themselves. In these circumstances no other procedure could have given Germany a federal and democratic constitution in 1848-49. As for the Weimar Constitution, nothing was certainly inherently wrong in it and in fact it could be said that it not only embodied the most up-to-date political and constitutional ideas but in some features (*e.g.*, in the new relations between the Federal Government and the Provinces) it was the most statesmanlike. All the same the constitution failed and culminated in the Hitler regime first because the Versailles Treaty turned out to be a great impediment to its success and secondly because the Hitler movement had the support of foreign interests and

even foreign Governments. Situated as Germany wan then, its Government could not overcome these obstacles.

Let us turn now to the Dominion experiences which have been commended. It must be remembered in this connection that the work done at Quebec would have been ultimately as abortive as it actually appeared to be during the two years which followed the Quebec Conference. Although mind had acted on mind at this city in 1864 and with ease seventy-two resolutions were adopted in less than three weeks, these resolutions could secure the support of only one legislature, namely that of Canada. In the Maritime Provinces they were virtually turned down. Public opinion in these provinces proved hostile to them. But this internal difficulty was overcome only because the external factor, namely the attitude of the British Government, was emphatically favourable. This Government put pressure upon the Lieutenant-Governors (one, it may be recalled, was transferred and another was invited to London for a talk) and influenced them in the direction of a union. Later also at London, Her Majesty's Government proved intensely cooperative and helpful in the framing of the B. N. A. Act on the basis of the Quebec resolutions. A slight encouragement on its part of the separatist forces would have nullified the work which had been done in British North America during several years for uniting the provinces. So it was not this or that procedure but the goodwill of the British Government which was the main factor of success.

In Australia again the work of the Convention of 1891, which was constituted by the different Legislatures proved abortive, although the delegates of the several Colonies had opportunity of entering into each others' thoughts and of being influenced by each others' ideas and although they had actually fashioned a constitution which was eminently reasonable and which in fact several years later became with only slight modifications embodied in the Commonwealth of

Australia Act. What was then the reason for its failure in 1891-92? Internal circumstances turned out to be the most unfavourable and neither any pressure from outside was exerted for their modification nor would possibly any such pressure, even if exerted, have made much difference at the time. Sir Henry Parkes was now a spent force and his rival, Mr. (later Sir) G. Reid was an opponent of the federal scheme. In view of his opposition, which was inspired largely by local politics, no federation in which New South Wales would be included was possible then and during the next few years.

So it was not a particular procedure but a set of circumstances which blocked the progress of the federation idea. It should be borne in mind that while in 1891 the Convention which was not popularly elected could not carry through its work to success, in 1898, a Convention popularly elected did it though after some setback. So no use blaming this method of constitution-making and commending the other one. It should be also remembered that there is similarly nothing in the thesis that while a large body fails, a small body may succeed in fashioning an acceptable constitution. A large body, if properly guided by its leaders, can work with as much expedition and wisdom as any small body may be credited with. In a large assembly to-day work of negotiation and compromise, when such work becomes necessary, is invariably arranged by leaders of different groups or parties. It cannot consequently be said that a large assembly is capable of adopting only one-sided decisions. On the contrary while a large representative body does not debar negotiations to be started and compromises to be carried out on the initiative and responsibility of a few leaders, it provides opportunity for all points of view to be canvassed, which by itself is certainly not bad, provided it does not make decisions impossible.

CHAPTER III

THE CHARACTER OF THE INDIAN CONSTITUENT ASSEMBLY

The idea of framing the Indian constitution through a sovereign constituent assembly is rather of recent origin. It is of course true that although such an idea had not been mooted in so many words by any accredited organ of Indian opinion before 1934, Indian leaders had emphasised from time to time after the conclusion of the first World War in 1918 the principle of self-determination for India in respect of the system of government under which its people were to live. Pandit Matilal Nehru, for instance, in his presidential address at the Amritsar session of the Indian National Congress in 1919 took strong exception to that provision of the Government of India Act passed in that year, which made the British Parliament the judge as to the fitness of the Indian people for further political reforms. He deeply resented "the injustice of submitting a nation's birth-right to the jurisdiction and decisions of an outside body". The late Mr. C. R. Das in his undelivered Presidential address at the 1921 session of the Congress also touched upon the same subject and observed "I think that we should solemnly declare in open Congress that freedom is inherent in every nation and that India has and possesses the right to develop her own individuality and to evolve her own destiny unhampered by what the British Parliament has decided or may decide for us."

It is significant that while the Indian public, parti-

cularly those sections of it which were connected directly or indirectly with the Indian National Congress, was affronted by the appointment in 1927 of the all-white Statutory Commission for investigating into the working of the Reforms of 1919 and recommending further changes in the system of government in this country, it did not put forward any demand at the time for a constituent assembly for framing the future constitution of India. The late Dr. M. A. Ansari who presided over the annual session of the Congress in that year observed no doubt in the course of his address: "No sane or self-respecting Indian can ever admit the claim of Great Britain to be sole judge of the measure and time of India's political advance. We alone know our needs and requirements best and ours must be the decisive voice in the determination of our future. It is our inherent and inalienable right."

But he did not demand for the enforcement of that right the setting up of any representative constituent assembly so that it might frame a constitution for India, suited to her genius and responsive to her ideals and traditions. He on the contrary still pinned his faith to a Round Table Conference which had been emphasised by Pandit Matilal Nehru in 1924 in a resolution which he moved in the Legislative Assembly. In this resolution which embodied the Indian national demand, Pandit Matilal urged the immediate necessity of a Round Table Conference between the representatives of India and those of Britain so that this Conference might chalk out ways and means for fulfilment of that national demand. Dr. Ansari in 1927 still believed in the efficacy of this method which had been suggested without result more than three years before. "Taking its stand on these principles", continued Dr. Ansari, "the Congress has all along advocated the convening of a Round Table Conference of the representatives of India and Britain with plenipotentiary powers to decide the bases of the

future constitution of India, to be incorporated into an Act of Parliament."[1]

It should of course be remembered that when we illustrate the fact that the Indian public so far advocated only a Round Table Conference for the solution of the political and constitutional problem of India, we do not mean to say that it was ruling out the idea of a constituent assembly altogether or that it was resorting to a less democratic procedure. Actually what the Congress leaders had in mind when they demanded a Round Table Conference was the Irish precedent which was at that time so fresh and so apposite. The Irish leaders had met at a Conference the representatives of the British Cabinet in 1921 and arrived at some agreed bases of settlement of the Irish question. Finally on the basis of the Articles of Agreement so formulated and ratified by the two countries the Irish Constituent Assembly framed the constitution of the Irish Free State. Similarly the Indian leaders looked forward to the conclusion of an agreement between them and the representatives of the British Government in a Round Table Conference and they hoped that such an agreement arrived at through this procedure might later be the basis of a constitution for India.

It was the manner in which the British Government responded to the Indian demand for a Round Table Conference, which ultimately convinced the Indian public of the futility of this procedure. A Round Table Conference may be successful only if some particular conditions are rigidly followed. In the first place there must be a rigid limitation of membership. Secondly, there must be concentration on some definite issues. Thirdly, members of the different groups attending the Conference must be the ac-

[1] The quotations of speeches are taken from A. C. Banerjee—Indian Constitutional Documents, Vol. II, pp. 261, 263, 283.

credited spokesmen of the groups and interests they were representing. None of these conditions were fulfilled by the series of Round Table Conferences which were held on the future constitution of India at London between 1930 and 1932. Members from India were chosen at random from all classes and groups, irrespective of the status they had in the country. Members from Britain did not again represent only the British Government. They also were chosen from all parties.

The total memberhip was again allowed to swell to eighty-nine. The issues to be discussed were also not confined to a few fundamental ones. All kinds of subjects which might have any bearing upon the future constitution of India came up for discussion in the Conference. So instead of calling it a Round Table Conference, one might better characterise it as a Conference of people of all shades of thought airing their views for whatever they were worth regarding all matters connected with the future constitutional organisation of India. It was really a babel of all tongues. The records of these Conferences have certainly some historical value, embodying as they did many interesting materials otherwise difficult to obtain and containing as they did the observations of certain men of light and leading on several administrative and constitutional problems of this country. But, however valuable these Conferences might have been in these respects, they were an utter failure as they were expected to be in the main task of setling issues between Britain and India.

The failure of the Round Table Conferences, it may be repeated, convinced the leaders of Indian opinion that the Indian constitution must be framed without any previous agreement of Britain as to fundamental issues between that country and India. This might be done only through a soveriegn constituent assembly. It was, therefore, to such an assembly that the Indian National Congress turned from 1934

onwards. In May of that year the Swaraj Party which was holding a Conference at Ranchi adopted this resolution—"This Conference claims for India the right of self-determination, and the only method of applying that principle is to convene a Constituent Assembly, representative of all sections of the Indian people, to frame an acceptable constitution." The principle so laid down was confirmed by the All India Congress Committee held at Patna some time later.

It was not, however, till December 1936 that the general session of the Congress had any opportunity of discussing the subject and approving of the decision of the All India Congress Committee. At the Faizpur session the subject was on the agenda and the Congress adopted the following resolution: "The Congress stands for a genuine democratic State in India where political power has been transferred to the people, as a whole, and the Government is under their effective control. Such a State can only come into existence through a Constituent Assembly having the power to determine finally the constitution of the country." In view of the attitude of the British Government regarding India's voice as to its belligerency, the Congress withdrew its members from the provincial Ministries in 1939. Its Working Committee adopted on this occasion a resolution (November 1939) in which it reiterated the demand for a Constituent Assembly. "Recognition of India's independence", the resolution laid down, "and the right of her people to frame their constitution through a Constituent Assembly is essential."[2]

While the Indian National Congress was thus committed to the principle of framing the constitution of India through a constituent assembly, the Muslim League which, with the operation of the constitution of 1935, became increasingly a force to be reckoned with in the country did not at first take

[2] These facts and quotations are taken from Dr. S. Sinha's Inaugural Address at the Constituent Assembly. See Debates, Vol. 1., No. 1. pp. 5-6.

kindly to this idea.[3] It apprehended that a constituent assembly in which non-Muslims would inevitably be in the majority might not frame a constitution on the lines which it deemed essential. But after the passing of the Pakistan Resolution in 1940, the Muslim League also appeared to be reconciled to the method of the Constituent Assembly provided of course there would be a separate assembly for the Pakistan areas. When public opinion had so crystalised on the procedure of framing the future constitution of India, His Majesty's Government decided to send down to New Delhi Sir Stafford Cripps who had been British Ambassador at Moscow at a critical hour of the War and who on return from his Moscow mission had been included in the Cabinet in a very responsible capacity. His prestige was at that time very high and his capacity to get things done in adverse circumstances was recognized. He came down to New Delhi on March 22, 1942 with a Draft Declaration of His Majesty's Government regarding British policy in India in his pocket. This he did not make public until March 29.

We are not concerned here with other aspects of this Declaration whose provisions are better known in this country as Cripps' Proposals. Nor are we concerned here with the causes of the break-down of the talks, which Sir Stafford had with the leaders of different schools of political thought in this country. It is only the kind of machinery which was envisaged in the Draft Declaration for framing the future constitution of the Indian Union after the cessation of the World War, which is of interest to us at this place. "Immediately upon cessation of hostilities, steps shall be taken to set up in India in manner described hereafter an elected body charged with the task of framing a new constitution for India." "The constitution-making body shall

[3] M. A. Jinnah's Speech at the Lahore Session (1940) of the Muslim League. See Recent Speeches and Writings of Mr. Jinnah Edited by J. Ahmad, 1942, p. 142.

be composed as follows, unless the leaders of Indian opinion in the principal communities agree upon some other form before the end of hostilities.

Immediately upon the result being known of provincial elections which will be necessary at the end of hostilities, the entire membership of the Lower Houses of Provincial Legislatures shall as a single electoral college proceed to the election of the constitution-making body by the system of proportional representation. This new body shall be in number about 1/10th of the number of the electoral college.

Indian States shall be invited to appoint representatives in the same proportion to their total population as in the case of representatives of British India as a whole and with the same powers as British Indian members".

This machinery as set forth above was not called in the Draft Declaration a constituent assembly. It was mentioned there only as a constitution-making body. That was certainly a more modest and a more matter of fact name. Possibly, the phrase constituent assembly was avoided purposely as a constituent assembly ought to mean either a sovereign body by itself or a body accredited by the sovereign people for the purpose of framing on their behalf the constitution of the country. It is not unlikely that the British Government was unwilling to call the machinery they suggested by such a name as might convey an impression that it was a sovereign authority. But if the body set up under the Cabinet Mission Proposals of 1946 could be called a constituent assembly, the constitution-making body suggested in Cripps' Proposals might, even more appropriately, be given that name.

But Cripps mission did not succeed. The Draft Declaration, which he had brought with him, proved unacceptable to all political organisations which mattered in this country. All of them had, of course, different reasons of their

own for rejecting the proposals. The Hindu Mahasabha rejected it mainly on the ground that the Declaration provided for provinces keeping out of the Indian Union. The Congress rejected it mainly on the ground that there was no agreement in respect of the interim arrangement. The Muslim League's main objection was to the provision that there would be only one constitution-making body in which non-Muslims would have a large majority. In any event Sir Stafford Cripps had to go away without getting anything done and India relapsed into an imbroglio which continued till 1946.

After the failure of the Cripps Mission in April, 1942, India passed through a long period of internal and external troubles, which did not end before the middle of 1945. It was in June of that year that fresh attempts were made by the British Government to deal with the Indian constitutional problem, and the Secretary of State for India made in the House of Commons a statement in which he reiterated the principle that "the working of India's new constitutional system is a task, which can only be carried through by the Indian peoples themselves". But the procedure according to which this new constitutional system was to be reared must be decided upon by agreement among the political leaders of this country. His Majesty's Government would not, of course, merely look on while these leaders would continue to disagree On the contrary they would be "most anxious to make any contribution that is practicable to the breaking of the political deadlock in India."[4]

Actually, however, so long as Churchill and Amery continued to be the Prime Minister and the Secretary of State for India respectively nothing serious was done to break this deadlock. On the contrary Mr. Jinnah's decided stand

[4] A. C. Banerjee—Indian Constitutional Documents, Vol. II, pp. 434-47.

against proposals, which were discussed in the Simla Conference held some time after the Secretary of State's statement referred to above, made that Conference quite abortive. But although all efforts made at Simla in the middle of the year 1945, were without any fruit, His Majesty's Government believed that the situation might become more clear after the general elections to the different legislatures in India which were to be held in the cold weather of 1945-46. Accordingly the Governor-General, Lord Wavell, announced on September 19, 1945 that as soon as possible after the elections His Majesty's Government intended to convne "a constitution-making body".

It should be remembered that meanwhile in the general elections held in Britain after ten years the Conservative Party was decisively defeated inspite of the fact that Mr. Churchill with all his wartime laurels continued to lead that Party. The Labour Government which was now constituted with Mr. Clement Attlee as Prime Minister, Lord Pethick-Lawrence as Secretary of State and Sir Stafford Cripps as another important member of the Cabinet was unwilling to allow the political advance of India to remain blocked by communal deadlock. On the 19th February, 1946, when elections in India had in most cases been held, the Secretary of State in the House of Lords and the Prime Minister in the House of Commons announced that with the approval of His Majesty the King the Government was sending out to India three members of the Cabinet, namely Lord Pethick-Lawrence, the Secretary of State for India. Sir Stafford Cripps, the President of the Board of Trade and Mr. A. V. Alexander, First Lord of the Admiralty, who in association with the Viceroy would act as a special mission of the Cabinet in India and this mission in consultation with the leaders of Indian opinion would settle new lines of action for India's poltical and constitutional advance. In the debates which were held in the House of Commons on

March 15, 1946 on this announcement, communal differences in this country and the necessity of protecting minority interests and rights were emphasised but the Prime Minister while appreciating the difficulties created by the presence in India of a congeries of races, religions and languages and admitting the importance of protecting the rights of the minorities observed also that "on the other hand, we cannot allow a minority to place a veto on the advance of the majority."[5] So the Cabinet Mission with their personal staff started from Britain "resolved to succeed" and arrived at Karachi on the 23rd March 1946.

The Cabinet Mission began work at New Delhi on the 27th March and had interviews from the 1st to the 17th of April with leaders of different schools of political thought in this country and the rulers of Indian States. Then after a short recess they made all efforts to bring about some kind of a compromise between the Congress and the Muslim League so that they together might agree not only as to the composition and powers of the Interim Government of India but also as to the procedure to be adopted for settling the system of future governance of India and its component units. Unfortunately no agreement between the League and the Congress was in sight as to the fundamentals of government either for the interim period or in the future. In view of this continued deadlock, the Cabinet Mission announced on May 16, 1946 their own proposals—proposals both as to the composition of the Interim Government and as to the procedure to be followed in framing the new constitution for India and its component parts.[6]

[5] This Speech as also relevant documents regarding Cabinet Mission and its work in India are included in the compilation entitled The Cabinet Mission in India (1946) by A. C. Banerjee and D. R. Bose.

[6] These proposals were embodied in what is known as the Cabinet Mission Statement of May16, 1946 which was published as a White Paper and is included in the compilation referred to above.

In paragraph 2 of the Statement the Cabinet Mission explains why it had to lay down the procedure, which the leaders of Indian opinion had been expected to chalk out themselves. They quoted the words of the Prime Minister, Mr. Attlee, to show that it was the intention of the British Government to allow the people of India to decide as to the kind of constitution under which they would live. They might decide even as to the fundamental issue of India remaining or not remaining inside the British Commonwealth. "Charged in these historic words we—the Cabinet Ministers and the Viceroy—have done our utmost to assist the two main political parties to reach agreement upon the fundamental issue of the unity or division of India. After prolonged discussions in New Delhi we succeeded in bringing the Congress and the Muslim League together in Conference at Simla. There was a full exchange of views and both parties were prepared to make considerable concessions in order to try and reach a settlement but it ultimately proved impossible to close the remainder of the gap between the parties and so no agreement could be concluded. Since no agreement has been reached we feel that it is our duty to put forward what we consider are the best arrangements possible to ensure a speedy setting up of the new constitution. This Statement is made with the full approval of His Majesty's Government in the United Kingdom." Again in paragraph 24 they repeat what they said in the paragraph just quoted. "We and our Government and countrymen hoped that it would be possible for the Indian people themselves to agree upon the method of framing the new constitution under which they will live. Despite the labours which we have shared with the Indian parties, and the exercise of much patience and goodwill by all, this has not been possible. We, therefore, now lay before you proposals which, after, listening to all sides and after much earnest thought, we trust will enable you to attain your independ-

ence in the shortest time and with the least danger of internal disturbance and conflict."

It may, of course, be pointed out that British policy in the past was really responsible for the disagreement between the Congress and the Muslim League. But, whatever might be at the back of the disagreement, the fact was that in 1946, the gulf between the two organistaions and the groups of people they represented could not be bridged. In consequence of that there could be no agreed procedure according to which the future constitution acceptable to all such groups might be framed. It may again be pointed out that in the absence of any agreement between the Congress and the League a constituent assembly might be elected by the general body of voters irrespective of their communal affiliations and irrespective of their membership of either organisation. This counsel of perfection would, however, be altogether impracticable in view of the existing cleavage between the two major communities in the country as proved in the general elections of 1945-46. It would be impracticable also in the absence of any Government taking responsibility for elections on this basis to a constituent assembly. The British Government in India would not certainly go in for it and no other Indian Government would be allowed to take its place without a prior settlement of the long term issue. So the Cabinet Mission with the full concurrence of His Majesty's Government laid down the procedure according to which a constituent assembly would be established to frame the future constitution of India.

The Cabinet Mission laid down in paragraphs 18 and 19 of their Statement the principles on the basis of which the different provinces and their component communities as well as the Indian States would be represented in the Constituent Assembly. The number of members they would have in this body and the mode of their selection were also referred to therein. The procedure according to which the Constitu-

ent Assembly as a whole and the Sections into which it was divided would work was also laid down in sub-paragraphs (iii) to (vii) of paragraph 19, and in paragraph 20. Further it should be noted that in paragraph 15 the Constituent Assembly was empowered to set up an Indian Union whose Government might be invested with jurisdiction wider than what was stated therein provided certain conditions were fulfilled. Otherwise the Union Government could be empowered by the Constituent Assemby to undertake responsibilities only in those fields which were specially mentioned in that para.

Details were these. The provinces were grouped into Sections. In Section A were included the provinces of Madras, Bombay, U.P., Bihar, Central Provinces and Orissa; in Section B were included the Punjab, North-Western Frontier Province and Sind; in Section C were included Bengal and Assam. The total representation of Section A would be 187, of Section B 35 and Section C 70. Total for British India would thus be 292 to which, howevers, would be added four members representing Delhi, Ajmer-Merwara, Coorg and Baluchistan which are not Governor's provinces. It should be added that of these four the first three would be added to the representation of Section A while the last one would be added to the representation of Section B. Then of the total representation of Section A, Madras would have 49, Bombay 21, U.P. 55, Bihar 36, C.P. 17 and Orissa 9. Similarly in Section B, the Punjab would have 28, North-Western Frontier Province 3 and Sind 4, while in Section C Bengal would have 60 and Assam 10. It would be noticed that representation of the provinces in the Constituent Assembly was determined on the basis of population—one member being allotted to one million people. On the same basis the representation of the three communities—General, Muslim and Sikh—which were required to elect their representatives separately was also decided upon. Muslim representation in different provinces was for instance this—

Madras 4, Bombay 2, U.P. 8, Bihar 5, C.P. 1. Orissa 0, Punjab 16, N-W. Frontier Province 3, Sind 3, Bengal 33, and Assam 3. The Sikhs were given separate representation only in the Punjab, they securing 4. It was laid down in the Statement that "the representatives allotted to each community in a Province shall be elected by the members of that community in its Legislative Assembly." It should be emphasised that the "General" community included all persons who were not either Muslims or Sikhs. The States "would in the preliminary stage be represented by a Negotiating Committee" but later their representation in the Constituent Assembly might be as large as 93. The method of selection of these 93 members was not determined by the Cabinet Mission. It was left to be decided upon by consultation. So if all the States joined the Assembly, its total strength might be 389.

The Cabinet Mission not only laid down the details of representation as referred to above, but they also chalked out the proceedure according to which the Constituent Assembly would work either as a whole or in its Sections. It was provided that in framing the Union Constitution the Constituent Assembly would be guided by the provisions of paragraphs 15, 19 and 20 of the Statement. It would not for instance be entitled to hand over to the Union Government powers other than Foreign Affairs, Defence and Communications including "the powers necessary to raise the finances required for the above subjects". If however the Assembly was to add any other functions to the Union list, it would be authorised to do so only with the consent of the majority of the Hindu and the majority of the Muslim members present. A mere majority of the members of the Constituent Assembly as a whole would not be entitled to make additions to the list. Similarly in any matter raising a major communal issue the majority of both communities would be essential for its adoption. In deciding which of the resolutions raised

any communal issue, the Chairman "shall, if so requested by a majority of the representatives of either of the major communities, consult the Federal Court before giving his decision."

Then as regards fundamental rights of citizens, clauses for the protection of minorities and a scheme for the administration of tribal and excluded areas, an Advisory Committee containing "full representation of the interests affected" would be set up by the Constituent Assembly at a preliminary meeting not only to formulate these rights, clauses and scheme but also to advise as to whether they were to be incorporated in the Provincial, Group, or Union constitution. Then as soon as the preliminary work of the Constituent Assembly as a whole would be over, the provincial representatives would meet in their three respective Sections. It would be for these Sections to decide whether there would be Groups among the provinces represented in a Section or not. If they decided in the affirmative, they would settle both the Group constitutions and the constitutions of the Provinces included in those Groups. When this work in the Sections would be finished, the representatives of the Sections and the States would meet together in the Constituent Assembly as a whole "for the purpose of settling the Union Constitution." This done, there would be left the final step to be taken, namely, the negotiation of "a treaty between the Union Constituent Assembly and the United Kingdom to provide for certain matters arising out of the transfer of power."

The provisions of the Cabinet Mission Statement regarding the composition and procedure of work of the Constituent Assembly, as detailed above, made that Assembly practically hidebound. In this respect the Cripps proposals of 1942 in regard to the setting up and the functioning of a constitution-making body were far more liberal. This body would have under the proposals much greater

latitude to formulate its own procedure of work and greater freedom to define the relations between the Indian Union and its component units.[7] It is true that the Cabinet Mission Statement would not be effective without the approval of the major political organisations in this country. But even if they approved of the limitations under which the Constituent Assembly would be required to work, there is no gainsaying the fact that there would be still these limitations upon the freedom of the Assembly in making its decisions.

It is significant that the Constituent Assembly would not be allowed even to make its own interpretations of the clauses of the Cabinet Mission Statement. There was a grave disagreement between the Congress and the Muslim League as to the interpretation of sub-Section (v) of paragraph 19. In paragraph 15 it was stated that "all subjects other than Union subjects and all residuary powers should vest in the Provinces" but "Provinces should be free to form Groups....". In view of these provisions in paragraph 15, the Congress interpreted the disputed paragraph [19 (v)] as allowing the provinces the option of entering into a Group or not. But the Muslim League thought the question of grouping would be decided by a majority of votes in a Section irrespective of the wishes of any province. On the eve of the first meeting of the Constituent Assembly

[7] Cripps proposals regarding constitution-making body were as follows Immediately after the end of hostilities "an elected body charged with the task of framing a new constitution for India" would be set up. In the absence of any other agreed plan, the members of the lower houses of the provincial legislatures "shall as a single electoral college proceed to the election of the constitution-making body by the system of proportional representation. This new body shall be in number about one-tenth of the number of the electoral college." Indian States would be invited to appoint representatives of their own. "His Majesty's Government undertake to accept and implement forthwith the constitution so framed" subject to two conditions.....(i) Provincial non-accession (ii) treaty with His Majesty's Government regarding protection of minorities.

on December 9, the British Cabinet published (on December 6) its own interpretation of the clause which practically tallied with that of the League.

In view of what is stated above, the observations of the permanent Chairman, Dr. Rajendra Prasad, which he made in course of his reply to the congratulatory speeches in the Constituent Assembly may not appear very appropriate. "This Constituent Assembly", he said, "has come into being with a number of limitations, many of which we will have to bear in mind as we proceed. But, it must also be borne in mind that the Assembly is a sovereign body and is fully competent to conduct its proceedings in the manner it chooses to follow. I also believe that it is competent to break the limitations attached to it at its birth." [8] Evidently Dr. Rajendra Prasad was thinking that the limitations which had to be imposed upon the working of the Constituent Assembly only because of communal disagreement might and would be eliminated if the disagreement was removed and members of different communities in that Assembly worked in harmony.

The question, however, was whether such harmony might be expected in the circumstances prevailing in the country. Most people would think not. In fact the Chairman's observations might appear too optimistic as to the disappearance of communal discord and the limitations on the Assembly which such discord made inevitable. But so long as the limitations were there, the Constituent Assembly could not by any stretch of imagination be regarded as a sovereign body. In fact just as a non-sovereign law-making body of Dicey draws its powers and limitations from a fundamental law which enshrines the sovereign will, so also the Constituent Assembly of India draws its powers as well as limitations from the Cabinet Mission Statement of May 16, 1946

[8] Constituent Assembly Debates, Vol. 1, No. 3, p. 49.

and the subsequent interpretations of its clauses by the British Cabinet as contained in their Statements of December 6, 1946 and February 20, 1947.

The basic principle observed in the composition of the Constituent Assembly should also be considered in assessing the character of this body. It must be borne in mind that it was not the Indian people as such who were allowed to be represented in the Assembly. It was the people as affiliated to the different religious communities whose representatives were returned to this body. What was more, though the Prime Minister, Mr. Attlee, observed in course of his speech in the House of Commons on the 15th March 1946 "we cannot allow a minority to place a veto on the advance of the majority", actually, as it turned out, the basic principle underlying the Constituent Assembly was communal agreement. Such agreement as a condition precedent to all political advance in India had been emphasised since 1940 both by the Viceroy, Lord Linlithgow, and the Secretary of State, Mr. Leopold Amery. On August 8, 1940 the former observed in course of a statement that His Majesty's Government "could not contemplate the transfer of their present responsibilities for the peace and welfare of India to any system of government whose authority is directly denied by large and powerful elements in India's national life". In other words unless all large and powerful elements agreed as to the system of government to be set up, there could be no change in India's constitutional status and organisation. As late again as June 14, 1945, Mr. Amery pointed out that, India's political aspirations could be achieved only "under a constitution or constitutions framed by India to which the main elements of India's national life are the consenting parties". Although, it may be repeated, Mr. Attlee's speech on March 15. 1946, as quoted above, might indicate a change in this attitude of the British Government, communal agreement continued to be regarded as the major plank on which

a new constitution and even the procedure to frame it would stand.

The Cabinet Mission Statement of May 16 itself was intended mainly to get "the two major communities to join in the setting up of the constitution-making machinery." It would be the basis of the new procedure for constitution-making only if the major communities approved of and accepted it. The British Cabinet made this further clear in their Statement of December 6, 1946, in which they observed "there has never been any prospect of success for the Constituent Assembly except upon the basis of agreed procedure". Again the Prime Minister, Mr. Attlee, whose observation on March 15, 1946 has been referred to, himself emphasised in course of his famous announcement of February 20, 1947 that the Cabinet Mission Proposals "envisaged that the future constitution of India should be settled by a Constituent Assembly composed, in the manner suggested therein, of the representatives of all communities and interests in British India and of the Indian States....It is with regret that His Majesty's Government find that there are still differences among Indian parties which are preventing the Constituent Assembly from functioning as it was intended that it should. It is of the essence of the plan that the Assembly should be fully representative. His Majesty's Government desire to hand over their responsibility to authorities established by a constitution approved by all parties in India in accordance with the Cabinet Mission's plan. But, unfortunately, there is at present no clear prospect that such a constitution and such authorities will emerge".[9]

The statements detailed above could be interpreted to have only this significance that the Constituent Assembly as

[9] The British Cabinet Statement of Dec. 6, 1946 and the Statement of Mr. Attlee on February 20, 1947 are inserted in a compilation of documents and speeches, The Constituent Assembly of India, edited by A. C. Banerjee, pp. 172-174 and pp. 334a-334d.

set up under the Cabinet Mission Proposals was really a conference in which different communities in India would have their delegations and all these delegations must agree to the major decisions which the Assembly might arrive at. Without such agreement on the part of any delegation, these decisions would not be binding upon them, particularly in areas in which the community represented by this delegation was in a majority. So the Constituent Assembly which was inaugurated on the 9th of December 1946 and has since been at work was intended to be more a Round Table Conference than an Assembly embodying the will of the sovereign people.

It is remarkable that although in paragraph 22 of the Cabinet Mission Statement it was laid down that "it will be necessary to negotiate a treaty between the Union Constituent Assembly and the United Kingdom to provide for certain matters arising out of the transfer of power", in the Prime Minister's Statement of February 20, 1947, there was a clear indication that this arrangement might be altered. If the Muslim League representatives continued to remain out of the Assembly and if that body did not become fully representative on that account, it might not then be possible for His Majesty's Government to recommend the constitution framed by this truncated body to Parliament. In that contingency it might not be possible also for the United Kingdom to enter into a treaty with the Union Constituent Assembly. His Majesty's Government would then have "to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in some other way as may seem most reasonable and in the best interests of the Indian people."

It should be remembered in this connection that from the Constituent Assembly, when it met in December and

January last, only the delegates elected on League ticket were absent. In course of a much applauded speech on the Resolution on Aims and Objects on the 17th December, 1946, Dr. Syamaprasad Mookerjee emphasised[10] this fact so as to controvert the propaganda which was being carried on particularly in England that the Constituent Assembly as it was sitting then consisted only of Caste Hindu representatives. Indian States were, no doubt, not represented then in the Assembly but they were not expected under the Cabinet Mission scheme to be represented there at that stage. The Sikhs, the Scheduled Castes, the Anglo-Indians, the Indian Christians and those Muslims who were not elected on the League ticket were present in the Assembly along with the Caste Hindu representatives, and participating fully in its debates and sharing responsibility for the decisions which were being arrived at. In a short statement issued later, Dr. Rajendra Prasad also tried to bring home to those who still might entertain any doubt as to the representative character of the Constituent Assembly over which he was presiding that barring the Muslim League representatives all provinces and all communities were taking a full share of the work done by that body.

Now if the Constituent Assembly was really to be regarded as an assembly with plenary powers, none of its decisions would be less valid and less binding on account of the fact that members returned on the ticket of a particular party were keeping absent from its sittings. Inspite of their absence and consequent non-participation on their part in the deliberations of the Assembly, its decisions would still be binding upon them and the people they represented. But the Statements made on behalf of His Majesty's Government on December 6, 1946, and February 20, 1947, show clearly that they did not regard such decisions as binding

[10] Constituent Assembly Debates, Vol. I, No. 7, p. 96.

upon the Muslims, particularly in areas where they were in a majority. In other words, it may be repeated, that His Majesty's Government regards the Constituent Assembly merely as a Round Table Conference of the delegates of the major political parties in this country.

CHAPTER IV

PROBLEMS BEFORE THE INDIAN CONSTITUENT ASSEMBLY— SCHEDULED CASTES

India's constitutional problem which awaits solution at the hands of the Constituent Assembly is at once vast and complicated. It is, in fact, far more so than what a similar body had to face in any other country. In the United States of America, the problem was one of uniting into one commonwealth thirteen disjointed states which, indeed, presented diversity in some matters but whose population were descended mostly from the same stock, were accustomed to the same basic form of government and had generally the same political outlook. The problem was similar in Canada although in that country it was complicated by a racial factor. One half of an existing province was inhabited by people of a racial origin to which people of other parts were not affiliated. But the localisation of the French element in a particular portion of Canada softened the racial complication which otherwise might have been still more difficult. The separation of the area as a distinct province by itself and some concessions made in respect of its peculiar system of education helped in finding a rough solution of the racial question. In Australia again, the problem was only one of uniting six disjointed self-governing colonies into one commonwealth. It was not complicated by any racial question. On the contrary, the peoples of all the colonies were descended from the same British stock, spoke the same language and had the same political and social traditions.

In France in 1789 or at any subsequent time the people were homogeneous and had lived for centuries under one centralised government. Questions to which the Constituent Assembly had to attend were mainly whether the government should be republican or monarchical or whether parliament should be bi-cameral or unicameral. It is true that even in regard to these matters which appear to us at this distance of time so simple, there were sharp differences of opinion and it was not easy to conciliate the many groups which held views of their own in respect of these problems. But all the same there was no gainsaying the fact, that neither the first Constituent Assembly in France nor any of its successors was called upon to tackle problems as complicated as those now facing the Constituent Assembly at New Delhi. The constitutional problem in Germany in 1848 was difficult but still not as intricate as in India to-day. But even this difficulty was too much for a democratic solution. The Frankfort Assembly could not cope with the task. It was Bismarck who solved it in his own way after three resounding military victories in 1864, 1866 and 1870. If the matter was left to be decided in a democratic way, it is unlikely that a solution would have been found easily in the last century. The Weimar Assembly succeeded without much difficulty after the first World War in framing a new semi-federal constitution for Germany only because of two reasons. The first was that many of the difficulties which had faced the German people in 1848 were subsequently ironed out by Bismarck and his successors. The second reason was that defeat in the War of 1914-18 not only resulted in the expulsion of the ruling princes from power and removed thereby a serious impediment to constitutional progress but brought the German people face to face with reality in a stern world.

Possibly the problem of constitution-making in Russia after the fall of the Romanovs was as difficult and compli-

cated as in India at the present time. In fact, it may be said that the Indian problem is not as akin to the constitutional problem of any other country as to Russia's. Even "after the loss of Russian Poland, Finland, the Baltic Provinces and Besserabia, the U.S.S.R. contained, in 1926, 182 ethnic groups speaking 149 languages. If we ignore the smallest groups, thirty principal nationalities made up nearly 98% of the population."[1] These divergent groups and areas were kept together within the bosom of one Empire during Czarist days not by persuasion but by force. It could only be expected that with the expulsion of the Romanovs and the removal of their system of government, the sharp differences between one group and another, which had so long been kept under, would again rise to the surface and become a factor to be reckoned with. Actually as it is well known secession began and several of the most important units of the present day U.S.S.R. broke away from the Russian state. In case the constitutional problem of Russia had to be solved in a democratic manner by and through a constituent assembly immediately after the Revolution, it is very unlikely that any solution which would be at once wise and just, far-sighted and equitable, could have been arrived at. In fact, the Bolsheviks did away with the Constituent Assembly and proceeded during the first few years of the Revolution to rule the country under a constitution framed by themselves. It was not till later that a constitution was set up in a more regular way.

The vastness of the Indian problem may be appreciated from the fact that the constitution which the Assembly at New Delhi is to frame will be concerned with a territory of nearly 1,600,000 square miles and will affect the basic interests of a population of more than forty crores. These people, it should be borne in mind, are affiliated to different

[1] Sir John Maynard—The Russian Peasant and other Studies, p. 379.

religions and diverse languages and are descended from many racial stocks. The Simon Commission refers to 222 vernaculars spoken in this country[2]. Many of them are, no doubt, too unimportant and affect too few people. But the number of main languages in India is also, as Pandit Nehru has emphasised, not less than fifteen[3]. These languages raise at least two problems. First, a large body of people are born to and speak one of these languages and it will, therefore, be necessary to include provisions in the Constitution for effective protection against any interference with their natural use. Secondly, the existence of these different languages has militated against an achievement of complete unity among the Indian people. The different linguistic groups cherish different traditions and possibly represent different racial strains. While they are each kept together by the bond of a common language, they are separated from other groups by the diversity of their medium of expression. This is a fact always to bear in mind and the Constitution should be so framed as to recognise and accommodate it.. Religion is again another centrifugal element and it is significant that it cuts across linguistic divisions. While language divides the Indian people vertically, religion such as Hinduism, Sikhism, Islam and Christianity divide them horizontally and create interests to be safeguarded and apprehensions to be removed. Hinduism has again problems of its own which require solution. The Constituent Assembly should re-exmaine the relations between the Scheduled Castes and other Hindus and provide constitutional remedies for the ills from which the Hindu society in general and some castes in particular happen to suffer. The arrangement made under the Act of 1935, has not resulted in any real solution of the problem. It appears to be stereotyping the differences within the Hindu social body. Some remedy

[2] Report, Vol. 1, p. 13.

[3] Discovery of India, p. 186 (First Edition).

may possibly be suggested by which there may be an opportunity for all Hindus to advance together hand in hand.

Hinduism is no doubt based on a philosophy whose high merit even its detractors cannot deny but in practice it is based on the institution of caste. It will be irrelevant here to discuss the origin of the caste system or to enter into the question of the caste organisation being professional or otherwise. The fact is that the Hindu society is divided into a large number of castes—some higher, some lower and many in between. The higher castes have been held in respect and their members have enjoyed prestige and honour only because of their birth while the lower castes have been held in contempt and members of some of them have been denied many common and elementary rights. There is, however, no unanimity of opinion as to the exact number of Hindus who have been deprived of these rights on account of their birth. It should be remembered in this connection that the mere fact that people of one caste do not marry in another caste or interdine with its members, does not indicate that the latter are being deprived of any rights. This fact has no doubt created other problems—problems of Indian unity and administrative efficiency. But it establishes nothing as to the number of Hindus who are deprived of their elementary rights on the ground of their birth.

It should, in fact, be remembered that inter-caste marriages and in most cases inter-caste dining have been foreign to the Hindu society. Marriage and dining facilities have been so far sought by the Hindus only inside their own castes. It should be further emphasised that geographical localism has not unoften strengthened and reinforced this caste sectionalism in India. On this account it is common experience that even members of the same caste do not as a rule intermarry, if they had not lived in or near the same place in past ages. Varendra Brahmins in Bengal for in-

stance do not marry in other Brahmin families and intermarriage between Bangaj and other Kayasthas in Bengal has similarly been under a ban which is only slowly being lifted now. While such prohibition is so common inside a linguistic unit, it is not necessary to point out that people of the same caste but belonging to different linguistic provinces will have no social relationships, not even when they may have been living side by side for a century or more. That is why the Punjabis settled in Bengal for three hundred years have still to seek their husbands and wives in the Punjab and Bengalis in other parts of India have to seek Bengali alliance*. All-India Caste Conferences are no doubt held from time to time but they are mere fashionable shows organised in imitation of other All-India gatherings. They cannot hide the fact that there is no close relationship between people of different provinces on the ground of their belonging to the same caste.

The fact is that not only a higher caste man will not marry in a lower caste but what is more a lower caste man will also not seek such an alliance in a higher caste. Each caste is exclusive, rigidly so in regard to marriage and in an elastic way in respect of food and drinks. There is an impression in certain circles that the lower castes now scheduled for political purposes have possibly a unity and cohesion which divides them from the so called upper castes. This is, however, a delusion. They may have some common grievances against the upper castes but otherwise each of the scheduled castes is as exclusive as any caste outside the schedule. In fact, as it has been emphasised already, simply because one caste does not intermarry or inter-dine with

* The story of a Bengali girl born of a Tiwari family which had originally come from U.P. and married according to custon in a Tiwari family in U.P. is told with poignant details by Sarat Chandra Chatterjee in Srikanta, Vol. 1. It is a fiction but represents reality.

another, the latter does not thereby become depressed.

Next comes the question of untouchability. In calcuating the number of depressed class peoples, this has been the main criterion. If any upper caste man thinks that his food, drink and person are polluted by the touch of a lower caste man, the latter should be regarded as an untouchable and, therefore, as belonging to the depressed category. But any person acquainted intimately with the manners and customs of orthodox Hindus will bear testimony to the fact that this criterion leads us nowhere. The food and drink of an upper caste man are not polluted merely by the touch of a lower caste man but they are equally polluted when another upper caste man touches them. A Brahmin for instance would not allow his food to be touched by a Kayastha. Again a Hindu widow will not allow her food and drink to be touched by any other person, not even a close relative living in the same house. If, therefore, untouchability is the criterion of determining depressed classes, each caste may become depressed in relation to another. Even members of the same family may become untouchables in relation to one another.[5]

But this does not mean that there are no castes which are specially looked down upon by other Hindus and which suffer on that account from disabilities which do not attach to people of other castes. The Panchamas in the South were for instance until recently occupying a status which cried for instant modification. They were not allowed the use of a public road when a Brahmin would be travelling by it. They were not again allowed to live in the quarter of a town or village in which upper caste people would be living. In the North also there are castes like Methars, Doms, Malis, which have been particularly held in contempt although

[5] There is a Bengali saying: Twelve Rajputs have thirteen cooking pots.

they never suffered from disabilities which were the lot of the Panchamas in the South. In fact close acquaintance with the Hindu social organisation would show that it contains three groups of castes.—(i) a few higher castes commanding prestge and respect (ii) many middling castes which neither commanded respect nor suffered from disabilities (iii) a few lower castes which, as it has been pointed out already, have been held rather in contempt and treated badly.

But this three-fold division has not been dictated either by untouchability or by the absence of the right of intermarriage. These have very little to do with it. This division can be understood only in the light of traditions and has no concrete external basis. One may understand but may not explain it. Unfortunately for political purposes efforts were made for some years before the passing of the Government of India Act, 1935 to determine the castes which might be regarded as particularly depressed and schedule them for political representation. But as there was no concrete standard for this determination, people made their calculations according mostly to their political predilections. They would not, however, admit it. They would state that they were making their calculations on the basis of untouchability which, as we have seen already, was no criterion and on the basis of general backwardness which it was difficult to estimate. The result was that although most of these calculations were intended to inflate the number of depressed class people, they would not tally with one another.

The Auxiliary Committee of the Indian Statutory Commission, which was presided over by Sir Philip Hartog, took the view that the depressed classes were "those members of the Hindu Community who are regarded as outcastes or 'untouchables' and who have in consequence suffered from social disabilities in the matter of education and general

advancement".[6] The Committee calculated[7] that such popu- was in

Madras	..	..	5.53 million
Bombay	..	..	1.46 million
Bengal	..	..	6.64 million
U. P.	..	..	7.89 million
Bihar & Orissa		..	2.53 million
Punjab	..	..	1.70 million
C. P.	..	..	3.01 million
Assam	..	..	nil

The Simon Commission, however, following its own procedure of calculation observed that such population was in

Madras	..	..	6.5 million
Bombay	..	..	1.5 million
Bengal	..	..	11.5 million
U. P.	..	..	12.0 million
Bihar & Orissa		..	3.3 million
Punjab	..	..	2.8 million
C. P.	..	..	3.3 million
Assam	..	..	1.0 million

That these are not again the only versions as to the number of depressed class people is proved by the fact that the Chief Secretary to the Government of Bihar and Orissa informed the Lothian Committee[9] (on Franchise) in 1932 that according to the estimate of that Government there were in the Province 4.3 million depressed class people as against 2.53 and 3.3 million in the calculations given above. As regards Bengal again Lord Lothian and his colleagues observe in their Report[10]: "A few days before our report was signed, we received a telegram from the Local Government (Government of Bengal) to the effect that up to the date of the telegram the revised figure for depressed classes

[6] Report, p. 216. [7] *Ibid*, p. 218. [8] Report; Vol. 1; p. 40.
[9] Report, p. 113. [10] *Ibid*, p. 117.

in the province was 10.3 millions. This total includes the Rajbansis, numbering 1,804,371, who have themselves asked for exclusion and who, it is generally agreed, should be excluded." This observation will at once show the kind of reliance we can place upon figures supplied by the Government or an investigating committee as to the number of people who might be regarded as depressed and who might be scheduled on that account for special representation and protection.

It should be stated that while the Bengal figures as supplied above vary from 6.64 to 11.5 million, the calculation of the Bengal Provincial Franchise Committee (auxiliary to the Lothian Committee) was that the number of such people was only 72,000 in the Province.[11] That the Government also had grave doubts as to the number of castes in Bengal which should be regarded as depressed is illustrated by the fact that in the original Communal Award of the British Prime Minister only ten out of eighty general seats in the Bengal Legislative Assembly were reserved for the depressed classes. In the Poona Pact the number reserved was raised to thirty.. Actually in the schedule which is supposed to cover only the depressed castes, there are castes which should not be placed in the third division referred to earlier but among the middling castes. Rajbansis were for instance included in the schedule and if they did not themselves show resentment, they would have been there now. Namasudras whose number is more than two million cannot by any standard be included among those castes which are too backward and are particularly looked down upon. Consequently they also should have been outside the schedule. They are a large compact self-conscious body, comparatively advanced in education and culture and economically quite in a position to hold their own. In fact

[11] *Ibid;* p. 117.

if they can be included among the scheduled castes, all castes in this province might with equal propriety be scheduled.

Scheduling of castes on the basis of untouchability is, we may repeat, not feasible and on the ground of general backwardness is difficult and unscientific. There are backward people in every caste. Even among the higher castes which are traditionally advanced in education and in the acquisition of property and wealth, there are many singularly backward in both. Consequently it is unjust and inequitable to schedule a few castes on the ground of backwardness and provide for their economic and cultural uplift. It is of course true that as a result of scheduling, however haphazard it might have been, the castes included in the schedule have during the last one decade been awakened to a sense of their importance which they had lacked before. Politically they have now become a factor to be reckoned with and because of it the legislatures have from year to year voted funds earmarked for educational work among them. In Government services also they have figured more prominently than even before. It may no doubt be pointed out that without the scheduling of these castes for special representation this progress among them might have taken place. The crusade against untouchability led so persistently and vigorously by Gandhiji combined with the democratic upsurge throughout the world and particularly in India would have resulted in an appreciable improvement in the economic, educational and political status of the depressed classes. Scheduling might, therefore, be avoided without any detriment to the interests of the castes scheduled. Besides, while the object of all statesmen should be to do away with the differences between caste and caste and work for their fusion into one united social group, those who introduced the principle of scheduling a few castes for special representation acted on the assumption that caste system would remain as it was and differences bet-

ween one caste and another were not to be eliminated but perpetuated. If the authors of the Government of India Act, 1935 wanted by creating the scheduled castes to drive a wedge between them and the rest of the Hindu population, that object has of course largely failed. But all the same there is no doubt about it that while benefit to the scheduled castes of the arrangement of representation made for them is not quite unquestioned, its otherwise deleterious effect is palpable.

The remedy for the ills which now disfigure the Hindu society lies in breaking down the caste barriers and not in stereotyping them. But a comprehensive movement to this end can be the part of a policy of the Government; it cannot be dictated by the constitution. The constitution may, however, help in such a movement being vigorously conducted by certain negative and positive provisions. On the negative side, there should be no provision for scheduling of castes for special representation. Such scheduling creates vested interests of the castes so scheduled and thereby stimulates their opposition to the breaking of caste barriers. Secondly, any provision for their special representation damps and even undermines the enthusiasm of the other Hindus for uplift work among the depressed classes. On the positive side, the constitution should provide for adult suffrage so that the people belonging even to the humblest of castes might not be deprived of their political importance. Their right to vote will bring to them the opportunity of influencing Government policy regarding their educational and economic devolopment. The Provincial legislature, at least its lower house, if it is bi-cameral, should have a shorter tenure than at present. It may be reduced to three years as under the Montagu-Chelmsford Constitution. As a result of some such arrangement the general body of voters will have greater opportunity than now of making themselves a truly important factor of government.

CHAPTER V

PROBLEMS BEFORE THE INDIAN CONSTITUENT ASSEMBLY— NATIONALISM & PROVINCIALISM

The next problem, and perhaps the most important problem, before the framers of the future Indian constitution, is that of reconciling the forces and needs of Indian unity with the separatist forces which are at work in this country. The constitution of India needs to be so evolved as to provide for a steady balance between the two.

The historians of the Indian national movement may no doubt trace its origin to the activities of those great Indian leaders who, inspired by the rise of nationalism in Europe, held aloft in the seventies of the last century the banner of Indian unity and later in 1885 set up the Indian National Congress. It should, however, be remembered that these pioneers and their successors could only build upon foundations which already existed. The old Indian traditions of cultural unity were there to help and encourage them in their work of nation-building. The basic culture of different parts of India particularly among the Hindus was the same. Allegiance to the shastras, observance of religious ceremonies, sense of sacredness of particular places and general ideas as to individual and caste conduct were more or less uniform throughout India. In fact, as more than one scholar has emphasised, some kind of fundamental unity had been present for centuries in this country. Geographically also India was marked out for unity. No part, however large, was self-sufficient. One portion of the coun-

try was only a complement of the other. It was this compelling force of geography which was possibly at the root of the old Hindu ideal of Rajachakravarty. No ruler of a state in India would have his mission fulfilled and his goal reached until he would make himself the ruler of the whole country. In fact he would be neglecting his obvious duty and belying the traditions of Indian rulership if he did not perform the Asvamedha sacrifice, which involved the assertion of his authority over all the territories within the geographical frontiers of India. These ideals and traditions had been considerably reinforced by the all-India authority established by the Mughals. To the old factors of unity were added during Mughal times a new common medium of expression for administrative and cultural purposes, a common system of administration and lastly an overmastering sense of living under the protection of the same Government.

Towards the last quarter of the 17th century, Mughal authority no doubt began to break down. It is not necessary here to enter into the causes of this decline and fall of the Mughal Empire. But the fact stands out that the downward march which started during the last phase of Aurangzeb's reign was completed by Nadir Shah's invasion and violence. There was now left only a legacy of anarchy and ruin. Not only the unity which Mughal rule had fostered disappeared altogether but the old unifying traditons stimulated by the Hindu way of life in all parts of India were also violently upset during this period of anarchy and lack of governance. When, for instance, the Mahrattas made their repeated raids on Bengal in the eighteenth century and butchered people, violated women, burnt down houses and looted property and all this indiscriminately and without distinction of caste or creed, the Hindus in that province would be in no mood to claim affinity with Bhaskar Pandit and his Mahratta associates, although they might be performing

Durga Puja with all pomp and show.[1] In fact all sense of unity, even the sense of common culture, was smothered in that age of turmoil. Pilgrimages to holy and sacred places which constitute such an important bond of unity among the Hindus of different parts of India had in most cases to be discontinued on account of the depredations of robbers and *thagis* on the highways and general lack of facility and safety of travel.

But when men like the late Sir Surendra Nath Banerjee started the national movement in India in the last century, Pax Britannica had been established in this country for decades and with the return of peace, the establishment of a powerful central government and the opening of new facilities of safe and swift travel, the old traditions of fundamental unity among different parts of India were reasserting themselves with increasing force and vitality. The leaders of the Indian Association and later of the Indian National Congress now tried with considerable success to bring home to the people that custodians as they were of this rich body of cultural traditions they must not remain for all time under the thraldom of a foreign domination but should unite on the basis of those traditions and resist this domination. The national movement so started had not of course any consistent support and cooperation of the Indian Muslims. But about the attitude and outlook of the Muslim community detailed references will be made later. Here it is only to be pointed out that the efforts henceforward made for national unity were stimulated by different factors. The first and foremost among them was certainly the reaction on India of of the European national movements. Disunited Germany was united and became on that account strong and powerful. Italy again which was a mere geographical expression became united on the basis of nationlism, whose virtues

[1] Sir Jadunath Sarkar—Fall of the Mughal Empire, Vol. 1, Chap. III.

were so eloquently and effectively preached by Mazzini, and was acclaimed thereafter as a great power in Europe. If on the basis of nationalism the leaders of Young Italy could eliminate foreign rule from parts of their country and unite them into a strong national state, Indian unity could also similarly be achieved and Indian nationhood attained by efforts in the same direction. It is significant that Surendra Nath Banerjee began his public career by his lectures on the makers of new Italy.[2]

Secondly, the part played by Mughal rule in the achievement of Indian unity was repeated on a still wider and more far-reaching scale by the continuance of British rule in this country for over one century and a half. Sixteenth and seventeenth centuries were pre-eminently governed by feudal ideas and on that account the centralising force of the Mughal Government, though strong and powerful, could affect the general people only at few points. But in the altered circumstances of the 19th and 20th centuries, British rule could not but touch them more vitally and affect interests more diverse and minute. It should also be remembered that while Mughal rule could advance Indian unity only by its positive contributions, British rule promoted it both by positive contributions and by its negative results. The establishment of a strong central Government and a common system of administration and laws over a wide area had, of course, its stimulating effect on Indian unity. But its presence itself was an inspiration to Indian nationalism. No opposition to the Mughal Government could be of a national character. It had to be local and sectional. That is why opposition to Mughal rule only stimulated sectional forces and resulted ultimately in the Great Anarchy. But opposition to British rule helped in the organisation of

[2] A Nation in Making, Chapter V.

national forces and assisted for the time being at least in the achievement of Indian unity.

It is true that unity achieved on the basis of a common opposition to foreign domination could not be lasting. It would disappear with the withdrawal or even partial withdrawal of that rule. This danger may not only be apprehended but it is already upon us. Unity artificially inspired and fostered by foreign domination must disappear and give place to the diversity which had been lurking beneath the surface. But it could be emphasised at the same time that while much of Indian national unity was only of the surface and must give place to diversity, much of it has also deeper roots and cannot be smothered and replaced by sectionalism. Here again no reference is being made to Muslim separatism. That will be dealt with in another chapter. The problem of the Indian States will also come in for discussion at a later stage. But even apart from these factors, sectionalism is strong and powerful in India. This is illustrated by the outlook and policy of the different provincial governments since 1921, when British control was partially withdrawn and dyarchy set up. It should, of course, be borne in mind that sectionalism in India is not represented wholly and exclusively by provincialism and communalism. Not unoften sectionalism raises its ugly head on a district and even on a subdivisional basis. Particularly in the matter of distribution of jobs and contracts localism asserts itself in a manner which none can commend. If jobs and contracts under a District Board go in some cases to people even of a neighbouring district, the present writer is aware of a hue and cry being raised against the patronising of foreigners!

Apart again from communalism, it is provincial separatism which is the most dangerous political force to be reckoned with. District or sub-divisional particularism may be irritating at times but it cannot assume a dangerous proportion. But provincial sectionalism, based on a powerful

autonomous government and in most cases on a separate language, may become a rival to Indan nationalism. Consequently the constitution of India should be so drafted as to accommodate to a reasonable extent this provincial feeling without, however, endangering the unity of the country in important and vital matters. Several of the provinces of India are carved out on a linguistic basis. Some are still multilingual, as Bombay, Madras, C.P., Bihar and Assam. But since the days of the anti-partition agitation in Bengal in the early years of this century, emphasis has been increasingly placed upon linguistic provinces. As an earnest of the desire to form provinces on the basis of a language, Orissa and Sind were made provinces by themselves under the Government of India Act, 1935. It is not likely on this account that the existing multi-lingual provinces will remain for long as they are. There is already a persistent demand for Andhra to separate itself from the Madras Presidency and for the Maharastrian people of Bombay, C.P. and Berar to have a province of their own. The Bengali-speaking districts of Assam had been agitating for years for their separation from Assam and their inclusion in Bengal. Only recently due to outbreaks of communal orgies in Bengal and other parts of the country, this agitation has died down. Religious differences have now appeared to be more dangerous than linguistic or racial differences. It is likely on this account that Bengali-speaking districts of Assam will henceforward prefer to remain where they are.

Now a province carved out on a mono-lingual basis has certainly this advantage that its people who speak the same language, have the same ways of life and are imbued with the same social traditions have an opportunity of solving their problems in their own way without being hampered by the different needs of another linguistic group. Alexis de Tocqueville reminded us long ago that "The tie of language is perhaps the strongest and the most durable that can unite

mankind".[3] If the people living in a province can be so united, that is certainly to their advantage. Their problems of government become simplified to a great extent. But there is the other side of the shield as well. The more the people of a province become compact by virtue of their common language and traditions, the more separatist they tend to become in their relations with men and things outside the province. In fact they develop pretensions to a nationality of their own. Bengal partition of 1905 was resisted on more than one ground. But the most important ground was that such partition was dividing into twain the Bengali nation. Recently Mr. Gopinath Bardoloi, the Premier of Assam, speaking at Bombay on the question of Assam 'Grouping' with Bengal, observed: "It is not on communal consideration that we are opposed to grouping with Bengal, but Assam wants to be treated as a separate nation by itself."[4] He, of course, pointed out at the same time that this nation of Assam would be a unit of the Indian federation. But he emphasised the fact that the Assamese were a nation by themselves. Now this provincial nationalism may pit itself against Indian nationalism and finally engulf it. Even if its developments are not so logical; there is the risk of provincial patriotism being so marked as to create ill-feeling between one province and another and as to make Indian nationalism weak and ineffective.

In the Dominion of Canada the role of Quebec, inhabited predominantly by the French-speakng Catholics, does not aptly fit in with Canadian nationalism. In Jugoslavia

[3] Democracy in America. Vol. 1, Chapter 11.

A modern writer corroborates in emphatic language what was observed by Tocqueville more than a century ago. "Language is the most peculiar possession of a group, the strongest tie between its members, and its principal instrument of self-expression." See Bernard Joseph—Nationality: Its Nature and Problems p. 61.,

[4] See Statesmen of 11/1/47.

before the War the position of Croatia was rather anomalous. In the U.S.S.R. the Union Republics are no doubt organised on the basis of their separate linguistic and social traditions. Even some other units within the Union Republics are organised on the same basis. But it should be borne in mind that the system of government in the U.S.S.R. is not democratic in the same sense as we understand it. Apart from other factors, it should be noted that the whole political organisation in the U.S.S.R. is based on the control of one party. The Communist Party is a great centralising factor and the control exercised by it is an effective antidote to any separatism which might be fostered by linguistic divisions. So it should be repeated that the constitutional mechanism in India should be such as to give due importance to the separatist forces provided by linguistic provinces without, however, weakening the Indian nation and its Central Government. Necessarily the mechanism should be federal in character as otherwise provincial patriotism will not have full scope. In view of the historical position of the States and the separatist attitude of the Muslims,[5] even residuary power may be assigned to the units. Such residuary jurisdiction may no doubt ordinarily stimulate pretensions to sovereignty and aspirations for separate statehood. But if the powers delegated to the Union Government cover certain essential functions and have opportunities of growth and development, these pretensions on the part of the units will only prove idle and vain. In fact, residuary powers of the units may not necessarily be in conflict with a strong centre. It all depends how the line of demarcation is drawn. We need not, therefore, be very particular about the residuary jurisdiction being vested in the centre. But our objective in respect of maintaining the national inte-

[5] This Muslim separatism has now been recognised by the concession of Pakistan. So it cannot any longer be an argument for a weak centre.

grity of India should be clear and unambiguous. The maintenance of such integrity will require a strong and powerful centre. Accordingly no arrangement which is inconsistent with it should be entertained.

CHAPTER VI

PROBLEM OF THE INDIAN STATES

The future relation of the Indian States with the Indian Union is another important and vital problem to be tackled and solved by the Constituent Assembly. Of the total area of India amounting to 1,571,625 square miles, the the Indian States occupy 598,138 square miles. In other words nearly forty per cent of the Indian territory is included in these States. The proportion of their population is, however, far less. Their population is in fact about 23 per cent of the total population of India. The number of these States is more than six hundred. Some of them are large, populous and otherwise resourceful, but many are tiny with only scanty resources of population and income. On the one side is the State of Hyderabad with an area of 82,698 square miles, a population of nearly sixteen million and an annual pre-war income of more than eight crores. On the other side we come across an estate under the Guzarat State Agency called Bilbari which has an area of 1.65 square miles, a population of 27 and an annual income of Rs. 80.[1] As in area, population and financial resources we notice wide diversity among the States, so also in origin and status they are different. Forty of them only have treaty relations with the Paramount Power; "a larger number have some form of engagement or sanad; the remainder have been recognised in different ways".[2] It is

[1] See Memoranda on The Indian States 1934 (Published by the Government of India p. 98.

[2] Report of the Indian States Enquiry Committee (1928-29) p. 12.

impossible on this account that there can be any one solution for the constitutional problem of all the States.

The Indian States Enquiry Committee of 1928-29 brought out into clear relief the distinction in size, population and revenue, which was so glaringly noticeable among the States by pointing out that only 108 of them covered 514,886 square miles out of the total States area of 598,138 square miles, that out of the then total population of the States of 68,652,974, these 108 States had 59,847, 186 and that of the total annual income of about 46 crores of rupees, they enjoyed among themselves 42.16 crores. On the other hand 327 Estates and Jagirs which are also technically states had among themselves an area of 6,406 square miles, a population of only 801,674 and an annual income of only .74 crore.[3] While, it may be repeated, the number of the existing States is over six hundred, there is no gainsaying the fact that most of them are small and tiny. Under the Western India States Agency there are as many as 254 States, only 37 of which have an annual income of one lakh of rupees and above and only 8 of which have a population of one lakh and above. Similarly under the Guzarat States Agency there are 81 States, only 13 of which have an annual income of one lakh of rupees and above and only 4 of which have a population of one lakh and above.[4] It is significant that in in the Table of Seats provided for the Indian States in the Council of State and the Federal Assembly in Part II of the 1st Schedule of the Government of India Act, 1935, 120 seats out of the total of 125 reserved for the States in the Federal Assembly were allotted to less than 150 States and that also after several States were grouped together for filling one seat. The five seats which remained after the distribution of 120 seats only among 150 States were distributed among the remaining 450 and more States.,

[3] *Ibid* p. 10.

[4] Memoranda on the Indian States pp. 98-105. pp. 224-245.

The question now is as to how these few large and many tiny States would be accommodated in the Indian Constitutional mechanism. They cannot remain as they are without detriment both to their own interests and to the interests of the rest of India. The authors of the Report on Indian Constitutional Reforms of 1918 were constrained to observe: ".....it is impossible to deal with the constitutional position in British India without also conisdering the problems presented by the Native States. India is in fact, as well as by legal definition, one geographical whole. The integral connexion of the States with the British Empire not only consists in their relations to the British Crown, but also in their growing interest in many matters common to the land to which they and the British Provinces alike belong."[5] The Simon Commission which submitted its Report twelve years later also noticed in still greater detail the closeness of relations between the Indian States and the British Indian Provinces. The States, observed the Commission, "dovetail into the various Provinces of British India. The main arteries of communication, essential to the welfare of India as a whole, constantly pass in and out of State territory. On the journey from Bombay to Delhi, for example, the boundary between what is, and what is not, British territory is crossed many times. The frontiers which divide the States from British India do not, as a rule, present any prominent physical feature. The boundary had been drawn as it is either because the limit of State jurisdiction had thus been laid down long ago, or as the result of negotiation and agreement in the days of British expansion. It rarely happens that the political outlines of an Indian State are coincident with racial or linguistic divisions. For instance, there are more Sikhs in the Punjab Province than in the Sikh States; and more Marathas in the Bombay Presidency than under the rule of the Maratha Princes. On the other

[5] Report, p. 190.

hand, the bulk of the Kanarese speaking people are subjects of the Maharajah of Mysore while others live in parts of the Bombay and Madras Presidencies."[6] The same Commission in the second volume of its Report[7] refuted the idea that there were "two Indias ". "It would be more true to say that there is really only one India but that the unity of India includes the Indian States as well as British India. Apart from questions of control exercised at the Centre over the Provinces of British India All-India problems, whether of war or peace, are really common to the whole of India, and not limited to those parts of it which are painted red on the map. Consequently, whatever may be the future which is in store for British India it is impossible to conceive that its constitutional development can be devised and carried out to the end, while ignoring the Indian States."

The fact that geographically India was one and indivisible and that the functions of government which were common to the Provinces were equally common to the States was recognised by the framers of the Government of India Act, 1935. They laid down in that Act a procedure according to which the Indian States might accede to the Indian Federation. Unfortunately they also introduced another provision in that Act, which drove a fresh wedge between British India and the Indian States. It is of prime importance to remember that while the federal part of the Government of India Act, 1935, was not put into operation and the Indian States had no opportunity of entering into a federal union with the Provinces, a new procedure for the exercise of the functions of paramountcy over the Indian States was introduced under the Act and has been operated since 1937. This is not the place to discuss the question as to how and why the paramountcy over the Indian States became vested in the British Crown. Nor is it the occasion to discuss the

[6] Report Vol. I, pp. 84-85.

[7] Report, Vol. II. p. 193.

extent of interference in the affairs of the States which paramountcy confers on the Crown. It is enough to point out here that by virtue of paramountcy the British Crown may interfere in many affairs of the States in respect of which it may not claim otherwise any jurisdiction. Until the operation of the Government of India Act, 1935, these functions of paramountcy were exercised by the Crown "acting through the Secretary of State for India and the Governor-General in Council."[8]

In fact it was through the Political Department of the Government of India that this jurisdiction was exercised. But sometime after the introduction and first operation of the Montagu-Chelmsford Reforms an agitation was started in Princely circles in India for withdrawing the paramountcy duties from the Government of India and for providing for their exercise directly by the Crown. This was one of the questions which were referred to the Indian States Enquiry Committee appointed in December 1927. This Committee approved of the demand of the Indian Princes and recommended that "For the present it is a practical necessity to recognise the existence of two Indias and to adapt machinery to this condition. To this end we advise that in future the Viceroy—not the Governor General in Council as at present—should be the agent for the Crown in all dealings with the Indian States."[9] Accordingly the Government of India Act,[10] 1935, provided for the appointment of a Crown Representative. The Governor-General might himself be appointed in this capacity and actually since 1937 one and the same person has been appointed to act in both

[8] Report of the Indian States Enquiry Committee. p. 13.

[9] *Ibid.* p. 36. This Committee observed further: "We hold that the treaties, engagements and sanads have been made with the Crown and the relationship between the Paramount Power and the Princes should not be transferred without the agreement of the latter, to a new government in British India responsible to an Indian legislature." p. 52.

[10] Section 3.

capacities. But it should be remembered that the Crown Representative deals with the Crown's relations with the Indian States without any reference to the Government of India. What was at one time the Political Department of the Government of India has since 1937 become the Department of the Crown Representative. So while in the Montagu-Chelmsford Report of 1918 and in the Report of the Simon Commision in 1930 the need for closer collaboration between two halves of India was rightly canvassed, actually the enactment of 1935 resulted in further separation between them.

Indian opinion never approved of the separation so recommended by the Indian States Committee and carried out by the Act of 1935. The Nehru Committee which was constituted by an All Parties Conference and reported nearly two years before the publication of the Report of the Simon Commission did not see any justification for changing the machinery for the exercise of paramountcy functions. ".....we think it would be very poor statesmanship and shortsighted policy to ignore those obvious historical, religious, sociological and economic affinities which exist between the people of British India and the people of these States. Nor do we think that it is possible to erect artificial geographical barriers between the two."[11] In view of this community of interests which the Committee emphasised, it naturally opposed the theory of direct relationship between the Indian States and the British Crown, which was at that time being canvassed before the Butler Committee.[12]

Pandit Matilal Nehru and his colleagues were rightfully indignant at this attempt at driving a fresh wedge between British India and the States. They observed: "This Com-

[11] Report. p. 71.

[12] The Indian States Enquiry Committee was presided over by Sir Harcourt Butler.

mittee (Butler Committee) is sitting in camera but such information as is available from published statements leaves no doubt in our minds that an attempt is being made to convert the Indian States into an Indian Ulster by pressing constitutional theories into service".[13] The Nehru Committee discussed at length this new theory of direct relationship and found no justification, legal or constitutional, for its adumbration. It referred in this connection to "the hard and unchallengeable fact that from the early days of the Company it has been the Government of India and the Government of India alone which has dealt with the Indian Princes and Indian States".[14] As it has been pointed out already this Indian point of view regarding the exercise of paramount power was ignored altogether. The Government of India was deprived of its jurisdiction over the Princes and the States and such jurisdiction was under the Act of 1935 handed over to the Crown Representative.

If the Government of India remained vested, as it ought to have been with paramountcy powers over the States, the difficulty which is now likely to be encountered after the declared withdrawal of the British in 1948 might possibly have been easier of solution. The British Crown being the paramount authority and the Government of India having nothing to do with it, it has been declared that with the withdrawal of the British from India there will be no paramount power to exercise jurisdiction over any of the Indian States irrespective of their origin, status, size, population and other resources. In other words after June, 1948, all the six hundred Indian States many of which cover only a few acres of land and exercise jurisdiction only over a few hundred men, will become fully sovereign entities, entitled to take any course they desire to follow.

[13] Nehru Report. p. 72.

[14] *Ibid* p. 78.

In the Cabinet Mission Statement of May 16, 1946 there is no doubt a provision for the cooperation of the Indian States with the Constituent Assembly and their possible eventual accession to the Indian Union. In pursuance of the provision of this Statement both the Constituent Assembly and the Indian States have set up Negotiating Committees and these Committees are, at the time of writing, discussing the procedure of choosing the representatives of the States to the Constituent Assembly. At least one of the States[15] again has by direct negotiation settled its own quota of representation and the method of its choice. It is likely that other States may follow this procedure as well. But in any event it is important to remember that ultimately not only each of the States has the right to be associated with the Constituent Assembly or to keep away from it but even after being associated in one way or another with the Constituent Assembly each such State will have an unfettered right to accede to or remain away from the Indian Union as set up by the Constituent Assembly. Only the first hurdle will be crossed when a State joins the Constituent Assembly but the final hurdle will not be jumped until it decides to accede to the Union.

It has been emphasised already and it may be repeated here that with the exception of a few, the Indian States are too small in size and strength. Consequently whether they accede to the Union or keep out of it,* they present a problem which is not easy to solve. When they enter the Union, they are likely to do so only for the specific purposes for which the Union may be established. There will then be the problem

[15] Baroda. Subsequently many other States including several large and important ones joined.

*There are many vital reasons why the States should not keep out. These reasons call for the entry of even the large States into the Indian Union. But here the difficulty of most States to continue either as independent or as federal units on the ground of their scanty resources has been discussed.

of properly exercising the residuary powers in these State territories. In case again, they do not enter the Union, they will have full sovereign power in their own hands. But in either case it will be impossible for most of the States with their own resources to perform properly their duties. In British India, the North Western Frontier Province is the smallest but this Province also has a population of nearly three million souls and an income of more than four crores. If we regard these resources as the minimum for a provincial unit, a federated state to be well-governed must have at least resources equal to or just short of the resources of the North-Western Frontier Province. So it may be pointed out that unless a State has at present a population of at least two million, an annual income of at least a crore of rupees and a possibility of the expansion of these resources in the near future, it cannot be a unit by itself either within the Union or outside it. The only States which at once satisfy these conditions are Baroda, Gwalior, Hyderabad, Kashmir, Travancore, Mysore, Jaipur, Jodhpur, Patiala and Bhavanagar[16]. Apart from them there are some other States which also may have to be accepted as units by themselves, although their resources are not as stated. But as these resources are still great and further as the States enjoy great prestige for historical reasons, they may have to be allowed to survive. They are Cochin, Udaipur, Bikaner and possibly Rewa, Kolapur and Bhopal.

It may be pointed out that as the Sates, large and small, have been in existence for a long time and as they have during this period managed their affairs in their own way, they may be very well allowed to continue some how as units in the future as well. If all or many of them enter the Union, those of them which would not have sufficient

[16] Population of Bhavanagar is far too small but has excellent economic resources.

population so as to be entitled to even one seat in the Union Legislature may be grouped together for the purpose of representation alone. Otherwise they might be left to themselves. It is true that even those States which have been created by the British Raj have by this time enjoyed a long career. But what kind of administration would a State possibly maintain with an income which in most cases hardly exceeds ten lakhs a year and which in some Agencies is in average even less than fifty thousand? Anybody who scans the list of States and the area, population and income shown against them in the Memoranda on The Indian States published by the Government of India may be surprised that there are so many States whose income is even less than that of a small talukdar. It should be remembered that much of this small income has to be spent on maintaining in proper style the ruler and his family. This being the first charge on the revenues, only the little that remains after meeting this first charge can be utilised for keeping law and order and ministering to the welfare of the people. Not to speak of those States whose income is less than one lakh, even those States which have larger revenues cannot discharge their responsibilities in the proper manner. Until recently of course medieval ideas reigned supreme even in British Indian Provinces as to the obligations and functions of Government. In most of the State territories such ideas reign supreme even to day. No wonder therefore that a State Government could be regarded as quite efficient although it might not have troubled itself in the least not only with education or sanitation of the people but even with proper detection and punishment of crime.

But if India is not to remain a cesspool of ignorance, superstition and disease, most of the territories now administered by the State Governments must be placed under a better, more efficient and more up-to-date machinery of administration. But such machinery cannot be maintained by most

of the States out of their own resources. That is why the Crown Representative's Department has for some years past encouraged grouping among States of particular areas for certain essential administrative purposes. Particularly such grouping has taken place here and there in the matter of judicial and police organisation. It should, however, be remembered that co-operation is not government. It is possible for several States to group together and maintain for their common benefit an advisory agency or even a high court. But if day to day administration in important matters has to be carried on on a wider basis, a regular group government for undertaking the responsibility of such administration must be organised.

To what extent the organisation of such group government is possible and desirable it is difficult to say at once. But if the Princely government of the States remains intact, a group government above it will be difficult to set up. The States concerned will have to hand over some of its own functions to the group and the group in its turn will have to make over to the Union Government those functions which are common to all parts of the Union. It is very unlikely that a system so complex can be maintained. Grouping among Provinces as envisaged in the Cabinet Mission proposals will be discussed at a later stage. But it may be pointed out here that the defects of such grouping will be present equally when the units are States and not Provinces. There is, however, a difference in this that while the Provinces are natural units and the groups among them may be only artificial creations, most of the States cannot be said in any sense to be natural units of administration. They, it should be repeated, are too small and too weak to maintain any administration worthy the name. In their case, therefore, if a group among them is formed, they as states may have to be eliminated altogether in the interests of the welfare of the people of these areas.

The Orissa States, for instance, none of which can be an effective unit by themselves will have to form a group for administrative purposes. Now this purpose will be best served, if the States allow themselves to be merged in the Province of Orissa. People of the Province and of the States have close affinity in regard to language and culture with each other. In view of this, grouping with the Province will strengthen the Province itself and serve the interests of the existing States better. But such grouping will be most effective if it amounts to amalgamation. A sub-federation or a confederation either only among the States themselves or between some States and a neighbouring Province will only unnecessarily complicate matters.[17] It may be pointed out that the people of a State are bound together by common loyalty to the local ruling house and they may not like the idea of giving up their separate identity altogether and merge themselves completely in a wider unit. But it should be remembered that such loyalty is not a permanent bond. Localism fostered by this attachment to the ruler and his dynasty need not, therefore, be necessarily accommodated in the scheme of government. The vested interests of the ruling houses are of course another factor to be reckoned with. But it should be borne in mind that even if there is grouping with other States and then an accession to the Union the prestige and power of these dynasties will be automatically very largely diluted. Besides the rising democracy will be as much an encroachment upon their authority from below, as the pressure of the

[17] A movement has already been set on foot for bringing about confederations among small states. But no clear picture has yet emerged as to the character of these confederations. What powers will be left to the states and what powers will be handed over to the Confederation and how the government of the latter will be organised—these are vital questions. The present writer does not believe that they can be answered properly. In fact, if these plans for confederations materialise, they will unnecessarily complicate and disfigure the Indian body politic just as caste system has disfigured Hindu society.

Union and group governments will be from above. In view of this they should regard their vested interests as being chiefly of an economic consequence to them. So if some scheme of pension acceptable to them may be formulated, they need not have any objection to their territories being merged either in the neighbouring provincial territory or in the territory of a large neighbouring State. Such merging will of course be dictated both by geographical contiguity and by racial and linguistic affinity.

If such amalgamation either among territories of different small States or among territories of small states and that of a neighbouring Province can be carried out, there may not be in Princely India more than a dozen units for accession to the Union. Some of them, as has been indicated already, are existing large States, some of them again may be existing comparatively large States reinforced by the merging in them of neighbouring territories of small States and some may be amalgamated territories of small States. These last will have the status of a Province in the Union and consequently their relations to the Union Government will be the same as in the case of other Provinces. Their localism is not likely to be stronger. In fact as they are created by amalgamation of smaller units their localism may be still weaker.

The existing large States or those made large by the merging in them of contiguous territores of small States are likely to emphasise their sovereign jurisdiction and raise difficulties in regard to the form of their accession to the Union. In the Round Table Conferences the Princes and their Ministers harped too much and too long upon their sovereignty and on that account the question of handing over powers to the Federal Government became very much complicated. Whether it was currency and coinage, post office or tariff, invariably the discussion was turned back to state sovereignty. Currency was, for instance, not merely

a function which might have to be tackled on an all-India basis but it was also an emblem of State sovereignty. Consequently a State like Hyderabad raised difficulties about complete jurisdiction over this subject being handed over to the Federal Government. Similarly while it was admitted that post offices should be an all-India subject, there was considerable hesitation on the part of the representatives of several States to accept frankly full and complete control of the Federal Government over them, and this because post offices were not only a source of revenue but postage stamps were a symbol of State sovereignty.[18] There were other very important and basic matters in which the Princes and their Ministers were unwiling to appreciate and accept all the implications of federalism. They in fact wanted, as some one bluntly put it, to eat the cake and have it.

Left to themselves the Princes and their Ministers in 1947 might have been in a more unionist mood than they had been in the early thirties. At that time the control of the British Government over the States, which had been very stringent before, was to some exteht loosened. This was not merely the result of post-war reaction against Curzonin centralisation, but it was also the result of a new policy of encouraging the Princes to some extent as a make-weight against British Indian nationalism. In any event the fact was the Indian Princes had for some years before the holding of the Round Table Conferences enjoyed greater authority and exercised a freer hand in the affairs of their States. This necessarily sharpened and intensified their pretensions to sovereignty. It was in this mood that they attended the Round Table Conferences. Secondly at that time their ideas about a Federal Union were also not clear. They merely thought that by entering into the Federation they would have a share in the control of All-India affairs.

[18] See Proceedings of the Federal Structure Sub-Committee, Vol. I, p. 58.

But that they would be required to hand over a portion of their jurisdiction to the Federal Government and lose direct control over it escaped their attention. On this account they could not be very frank and straightforward in regard to the allocation of powers to the Federal Government. In fact so far as the States were concerned, the Government of India Act did not demarcate the federal jurisdiction. It left such demarcation to the discretion of the individual States at the time of their accession.

Although the federal portion of the Act of 1935 has not been operated and the Indian States have had no opportunity of entering the Federation, still the Indian Princes and their Ministers must be better posted to day as to the demands which any All-India federal plan would make upon them. In view of this, the States might have frankly and boldly surrendered the essence of power in respect of All-India affairs to the Union Government. The separate identity of their States would have been maintained as units of the Federation. Unfortunately the forces of separatism have been strengthened during the last few years by the rise of Muslim 'nationalism'. The demand for the division of India and for the establishment of Pakistan alongside Hindustan has been insistent since 1940. One separatist force naturally strengthens and reinforces another. It will be surprising if Muslim separatism does not encourage State particularism. But it is expected that statesmanship in Princely India will be wise and far-seeing and it will find in a strong and effective Indian Union the necessary equilibrium between the All-India needs and the particular interests of the Princes and people of those States which have sufficient resources of their own.

CHAPTER VII

DEMAND FOR PAKISTAN EXAMINED

The demand for Pakistan was formally put forward by the Muslim League at its Lahore Session in March, 1940. It is of course true as it might be expected, there had been an agitation for some form of a separate Muslim State in India for several years before this. It was, however, confined to a limited circle mostly in the Punjab. In 1930 for instance, Sir Muhammad Iqbal presiding at the annual session of the Muslim League at Allahabad tried to bring home to his audience the ideal of Pakistan.[1] He did not find much response at the time but the seed was sown and it began to germinate in the mind of at least a few ardent Muslims. One Chaudhri Rahamat Ali was actually so impressed by this address that he took up the cue and began to preach this new ideal in wider circles, particularly in Indian Muslim circles in England.[2]. Pakistan was not, however, taken seriously by any group of people until it was placed before the Muslim League by its President, Mr. Muhammad Ali Jinnah and was officially adopted by this organisation in 1940 as the ideal to be worked for.

The relevant portions of the Pakistan Resolution are as follows:

[1] "I would like to see the Punjab, the North-West Frontier, Sind and Baluchistan combined into a single state, self-governing within the British Empire. The formation of a consolidated North-West Indian Muslim state appears to me to be the final destiny of the Muslim North-West India". Mujibar Rahman Khan in his Pakistan (in Bengali) refers to an earlier movement for some such separate Muslim state as Pakistan. See pp. 71-78.

[2] See Coupland—Indian Politics (1935-42), p. 199.

"3. Resolved that it is the considered view of this session of the All-India Muslim League that no constitutional plan would be workable in this country or acceptable to the Muslims unless it is designated on the following basic principle, *viz.* that geographically contiguous units are demarcated into regions which should be so constituted with such territorial readjustments as may be necessary, that the areas in which the Muslims are numerically in a majority as in North-Western and Eastern Zones of India should be grouped to constitute "Independent States" in which the constituent units shall be autonomous and sovereign.

"4. The adequate, effective and mandatory safeguards should be specifically provided in the constitution for minorities in these units and in the regions for the protection of their religious, cultural, economic, political, administrative and other rights and interests in consultation with them; and in other parts of India where the Musalmans are in a minority, adequate effective and mandatory safeguards shall be specifically provided in the constitution of their religious, cultural, economic, political, administrative and other rights and interests in consultation with them.

"5. This Session further authorizes the Working Committee to frame a scheme of constitution in accordance with these basic principles providing for the assumption finally by the respective regions of all powers such as defence, external affairs, communications, customs and other such matters as may be necessary".

In other words those territories in the North-West and in the East of India, in which the Muslims were in a majority, were to be separated from the rest of the country and formed into independent states by themselves. The chief argument of Mr. Jinnah in sponsoring this demand for a separate Muslim state in India was, and is, that the Hindus and Muslims are two distinct nations and must be accommodated

in two separate states. Islam and Hinduism, he observed in his Presidential address at the Lahore Session of the All-Indian Muslim League in 1940, "are not religions in the strict sense of the words, but are, in fact, different and distinct social orders, and it is a dream that the Hindus and the Muslims can ever evolve a common nationality....The Hindus and Muslims belong to two different religious philosophies, social customs, literatures. They neither intermarry nor interdine together and, indeed, they belong to two different civilisations which are based mainly on conflicting ideas and conceptions....It is quite clear that Hindus and Musalmans derive their inspirations from different sources of history. They have different epics, different heroes and different episodes. Very often the hero of one is a foe of the other and, likewise their victories and defeats overlap. To yoke together two such nations under a single state, one as a numerical minority and the other as a majority, must lead to growing discontent and final disruption of any fabric that may be so built up for the government of such a state".[3] In the same month of March 1940, in a speech delivered at the Muslim University Union, Aligarh, Mr. Jinnah observed emphatically: "One thing is now obvious that we are by no means a minority but a solid and distinct nation by ourselves with a destiny of our own".[4] This destiny the Muslims must work out in their own way by establishing their own states in their own homelands in the North West and East of India. In other words as a nation they must have the right of self-determination.

The first question now is whether the relations between the Hindus and the Muslims in India were, and are, as Mr. Jinnah has described them to be. While a historian of Hindu-Muslim relations will have no hesitation to regard this description as considerably exaggerated, he must also admit

[3] Some Recent Speeches and Writings of Mr. Jinnah, p. 153.
[4] *Ibid* p. 133.

that there is a hard core of truth in it. It should be remembered that most of the Muslims in this country are of Indian origin. Their forefathers were at one time or another during the last one thousand years converted to Islam from Hindu faith. Even those Muslim families which had come from outside have mingled their blood freely with those converted from local population. Consequently it will be wrong to think that the Muslims and the Hindus differ in any large measure in their racial affiliations. In fact, largely they come from the same stock. Nor could it be said that in all cases conversion fully and completely Islamised the converted people and turned them absolutely away from the moorings of their old social outlook and traditions. Pandit Nehru refers to the fact that Islam sat so lightly upon a large section of the Kashmiri Muslims who had all been converted from their Hindu faith that in the middle of the last century they approached the Hindu ruler of the state with their offer of returning enbloc to Hinduism. But reconversion could not be undertaken because of the opposition of the Pandits of Benares to any such change of faith.[5] The common medium of expression and long residence side by side must have also stimulated not only interchange of thoughts and ideas but also many common social practices. Common language which is the result of the same racial origin or of long contiguous living or of both has been certainly a great bond of unity between the Hindus and Muslims in different parts of India. But, as Renan appropriately emphasised, common language invites but not necessarily forces unity. Its absence is a great handicap to unity but its presence does not necessarily stimulate it. That is why we should refer to this bond of unity between Hindus and Muslims but should not unduly emphasise it. Simply because two men may talk intelligibly to each other, it does not follow that they will necessarily talk. It so much depends on other factors.

[5] Discovery of India, p. 312.

These other factors have not in fact been very helpful in forming unity between Hindus and Muslims. They, on the other hand, successfully kept them separated and divided. The responsibility for such a separation has to be shared by both the Hindus and the Muslims. It should be borne in mind that when Islam started its series of invasions of India in a serious manner, Hinduism had already lost its elasticity and power of absorption and accommodation to a considerable degree. There had been waves of pre-Islamic invasion and infiltration into India in previous centuries from the steppes of Central Asia. It is not necessary to name these invaders and infiltrators. They are commonplaces of Indian history. But it is a fact that after hard fighting at the start between them and the local Hindu population, the barriers were gradually broken, approaches were made from each side and ultimately these immigrants found their due place in the Hindu social and religious organisation. The fact that Sakas, Hunas and other immigrants who had originally come as invaders became, with the march of time, part and parcel of the Hindu society is an irrefutable proof of the vitality and catholicism of old Hinduism. But when Islam knocked at the Indian gates, this vitality had been sapped to a large degree. Hinduism was now apprehensive of any approaches of foreign elements. It had in fact entered into its shell in self-defence. The Muslim invaders were also unlike those who had come in different batches into this country in previous centuries. The latter had no religious or cultural mission and consequently they had no reason to keep away from the Hindu social organisation. They enriched it where they could and contributed to its variety. But otherwise they accepted it without reservation.

The Muslims, however, entered into India as the torch-bearers of a new faith and a new civilisation. Their ideas about God were their own and admitted of no compromise and their manners and customs were as laid down in their

holy book. Their sense of superiority as to their own religion and civilisation was so assured and their zeal to propagate and impose them upon others was so unbounded that the question of accommodation or compromise with any Indian faith and social organisation would not arise. The political predominance of the Muslims for centuries accentuated the differences and widened the gulf between them and the rest of the people. Except in isolated instances Muslim government in India had been during all the centuries of Muslim rule essentially theocratic. The faithfuls alone constituted the governing class and enjoyed the privileges and sweets of office while their Hindu neighbours were not only excluded from all seats of authority but were suffered to remain in the country only on condition of their paying a poll tax to the state. This is a subject to which reference would be made later in a more elaborate way. But it is necessary to point out here that in view of this basic character of the Muslm state the relations between the Muslims and the Hindus could not on any account be satisfactory. The relations between the governing class and the governed can never be happy and cordial. Contempt on the one side and heartburning and secret resistance on the other become inevitably the chief features of this unhealhty relationship. When the political predominance of the Muslims disappeared in the eighteenth century, one cause of bad blood between them and the Hindus was, no doubt, removed thereby, but their social systems continued to be as different as they had been.

So, Mr. Jinnah's emphasis on Hindu Muslim differences may have justification, although it should not be overlooked that in spite of them the two communities have lived together side by side for centuries and have not unoften influenced each other in divers ways. In any event the mere existence of differences between the Hindus and the Muslims need not entitle the latter to call themselves a nation. It is

not of course the purpose of the present writer to enter into any detailed discussion at this place about this subject. Few topics have been discussed more threadbare in treatises on political science than the concept of nation. What are and what are not the essential ingredients of nationhood have received detailed attention from scholars and controversialists. It is significant that in abstract discussion few of them emphasise any one factor to the same extent. Some would attach greater importance to race than to language, religion and traditions. Some, however, would be placing the greatest emphasis upon religion. But usually it is agreed that while these different unities may each help in forming and strengthening a nation, none of them are essential for the purpose. What is, however, the most essential and indispensable for a nation to grow and develop is the common feeling of solidarity. If the Muslims of India have this feeling of solidarity among them on the ground of their common religion and if they call themselves a nation on that score, it is no use entering into a controversy with them about it. First, there is no hard and fast definition of a nation. Secondly it is after all for a group of people to decide as to how it should call itself. If the Bengalis or the Assamese choose to call themselves a nation, we have to hold our peace. Similarly, we must give the Muslims also the freedom to call themselves a nation if they so desire. It is again for them to decide whether they would include in this nation all the Muslims of India, the Muslims of certain parts of India only or not only all the Muslims of India but also the Muslims in other countries as well.

It should be pointed out here that although Muslim nationhood has been emphasised for a particular purpose by the leaders of the Muslim League only since 1940, there is no gainsaying the fact that the Muslims have all along regarded themselves in India as a body separate and different from the rest of the population. The Muslim states, so long

as they existed in India, made a distinction between the Muslims and the non-Muslims. When Muslim political power was replaced by British rule, this nation did not die out. Whenever there was an opportunity, it was directly or indirectly emphasised. Whether it was the question of introducing simultaneous competitive examination in India for recruitment to the Indian Civil Service, or whether it was the question of introducing elective principle in local and other bodies, it would not be discussed and decided on its merit. It would be mixed up with the question of safeguarding the interests of the Muslims[6]. It was, however, in 1906 when discussions between the Viceroy, Lord Minto, and the Secretary of State, John Morley, about constitutional reforms were well under way that the separate entity of the Muslims as such was for the first time during British rule fully emphasised on the one side and recognised on the other.

On the 1st of October 1906, "a Deputation of the Muslim community of India" waited upon Lord Minto at Simla and presented to him an address. This is not the place to enter into the history of this Deputation which has now been fully unearthed by recent researches.[7] It should, however, be pointed out here, that this large Deputation, which was led by His Highness the Aga Khan and which included Muslims of light and leading from all parts of India, stressed several very important points bearing on the peculiar position of the Muslims in this country[8]. "We venture, indeed, with Your Excellency's permission, to go a step further, and urge that the position accorded to the Mahomedan community in any kind of representation direct or indirect, and in all other ways affecting their status and influence should be commen-

[6] Report of Aitchison Commission on Public Services (1886-87) pp. 40-41.

[7] Asoka Mehta and A. Patwardhan—The Communal Triangle in India, 1942, Chap. IV.

[8] The full address and the reply of Lord Minto are inserted in Ambedkar—Pakistan or Partition of India (2nd Ed) Appendix XII.

surate, not merely with their numerical strength, but also with their political importance and the value of the contribution which they make to the defence of the empire, and we also hope that Your Excellency will in this connection be pleased to give due consideration to the position which they occupied in India a little more than hundred years ago and of which the traditious have naturally not faded from their minds". Again, "still, it cannot be denied that we Mahomedans are a distinct community with additional interests of our own which are not shared by other communities, and these have hitherto suffered from the fact that they have not been adequately represented". The Viceroy in his reply observed: "The pith of your address, as I understand it, is a claim that in any system of representation whether it affects a Municipality, a District Board or a Legislative Council, in which it is proposed to introduce or increase an electoral organisation, the Mahomedan community should be represented as a community.....and you justly claim that both your numerical strength and the political importance of your community and the service it has rendered to the Empire entitle you to consideration". Finally he observed "In the meantime, I can only say to you that the Mahomedan community may rest assured that their political rights and interests as a community will be safeguarded in any administrative reorganisation with which I am concerned...." It is important to remember that in the address of the Muslim Deputation there is a reference in two places to "Our national interests" and to "Our own national interests". The deputationists, of course, meant by them Indian Muslim interests.

So in 1906, not only the Mussalmans claimed to be and became recognised as a political community distinct from the rest of the population but there is an indication that even at that time they were at least vaguely conscious of their nationhood. The system of separate electorate introduced

under the Indian Councils Act of 1909, and later confirmed and extended by the Government of India Acts of 1919 and 1935, emphasised and sanctioned this distinctiveness of the Muslim community. In a speech at the Aligarh Muslim University Union to which reference has already been made, Mr. Jinnah referred to the importance of the separate electorate in the growth of the Muslim nation. "Ever since the Minto-Morley Reforms, most people had assumed that Muslims were a minority and as such needed safeguards for the protection of their rights; but when we use this term we meant it in an entirely different sense. What we meant was that the Muslims were a political entity and that must be preserved at all costs. The separate electorate was only an indication of this inner feeling of the Mussalmans. It was in this spirit that the Lucknow Pact was signed, the basic principle of which was that two separate distinct entities were entering into a mutual settlement".[9] But although the Muslims have been a separate entity in India since 1906, they were not acclaimed as a nation before 1940. We have referred, of course, to the use of the word in the address of the Muslim Deputation. Three years later, in 1909, another Deputation waited upon the Secretary of State, Lord Morley, with the same purpose. It was led by the late Right Hon'ble Syed Ameer Ali who observed: The Muslims "have common ideals, and by tradition of race and religion form a nationality quite apart from all other people in India". It is also true that in 1929, His Highness the Aga Khan used the word, nation, in referring to the Indian Muslims.[10] But the two nations theory was propounded by Mr. Jinnah in an article in Time and Tide, London, of the 19th January, 1940.[11]

[9] Some Recent Speeches and Writings of Mr. Jinnah, p. 132.

[10] F. K. Khan Durrani—The Meaning of Pakistan, p. 146. For Ameer Ali's observation see Mujibar Rahman Khan's Pakistan, p. 81.

[11] Even in his speech on Report of Joint Parliamentary Committee in the Legislative Assembly in 1935, Mr. Jinnah referred to the Muslims as a minority and as a separate entity. He had not yet thought of Muslim nationhood. See Speeches and Writings, p. 5.

It has been pointed out above, that so long as the Muslims regard themselves as a distinct political entity, it does not matter very much to others whether they call themselves a minority, a separate community or a nation. It would of course have been easier for a democratic experiment in this country to be successful if the Muslims as well as the members of other religious communities did not approach the affairs of the state as a distinct entity but as individuals. The tradition already created of looking to the state through the medium of the community has complicated and made intensely difficult the working of democratic government in this country. It may not be as difficult as many may think to roll back this tradition and establish direct relationship between the state and the individual in an effective manner. But so long as this tradition continues it has to be accommodated somehow in the constitutional mechanism.

But the Muslim League was not satisfied with separate electorate and separate representation as the invariable concomitant of the Muslims being a separate entity. Since 1940, it has asked for separate Homelands for Muslims in India where they would have their own state or states. In fact the theory of the Muslims being a nation was propounded with this object in view. In course of a speech in March 1941, as President of the Special Pakistan Session of the Punjab Muslim Students' Federation, Mr. Jinnah observed: "But it is as clear as daylight that we are not a minority. We are a nation, and a nation must have a territory. What is the use of merely saying that we are a nation? Nation does not live in the air. It lives on the land, it must govern land, and it must have territorial state and that is what you want to get".[12] So, Mr. Jinnah first calls the Muslims a nation, and then, as a concomitant of their nationhood, asks for a Homeland. It might be good strategy to declare a

[12] *Ibid*, p. 213.

population group a nation and then demand that as the nation becomes an absurdity without a separate home of its own, it must be provided with one. But simply because it is good strategy for Muslims, such a line of reasoning may not be valid and acceptable to others.

It should be remembered that the territories in the North West and the North East which the Muslim League is now claiming as the Muslim Homelands have been, from time immemorial, part and parcel of India. So long as the Muslims regard themselves as part and parcel of the Indian population, those territories are to be enjoyed as much by them as by other inhabitants who are not Muslims. But it is difficult to appreciate the logic of regarding those territories as the Homelands of the Muslims alone. It should be borne in mind that the non-Muslim population is not only large in these territories but in one of them it is in a large majority. In fact, in the North Western area the Muslims are only 62% and the non-Muslims nearly 38%. In the North Eastern area again the Muslim majority is still smaller. The Muslims are 51.69% while the non-muslims are 48.31%. It does not stand to reason that simply because a group of people is in a majority in an area, it should be regarded as its Homeland. It should be remembered also in this connection that the North-West of India is specially associated with the history and traditions of the non-Muslims of this country. But it has had no specifically significant place in the history of Islam. The land of the five rivers is the cradle of both Hindu and Sikh civilization in India. To regard that as the exclusive Homeland of the Muslims is doing violence not only to history but to present interests. Bengal had again a rich civilisation of its own long before any of its inhabitants was converted to Islam. It is also a fact that much of what makes Bengal respected in the eyes of the world is the handiwork of the non-Muslims. The Muslim inhabitants have always been welcome to share in the pro-

gress which the Province has made, but it is peculiar logic, which can justify the declaration of Bengal as the Homeland of the Muslims alone. Men only with warped imagination and jaundiced eye can ignore the facts and regard these territories in the North-West and North-East as Homelands of the Muslims. It is, however, surprising that even an academician of the standing of Sir Reginald Coupland of Oxford allowed himself to use the phrase the ***Muslim Homelands*** so often in "The Future of India" as to lend colour to the view that he actually regarded these territories as Muslim Homelands.

The basis of Pakistan being the declaration of the North-Western and North-Eastern areas of India as the Homelands of the Muslims, it does not take us long to understand why the local non-Muslim people would have serious and valid objection to its establishment. This objection may, of course, be met by an exchange of population between Pakistan and Hindustan territories. Muslim population of Hindustan may be shifted to Pakistan and vice versa. Mr. Jinnah himself has on occasions referred to such an exchange of population. There are others also who have supported it, particularly Dr. B. R. Ambedkar who makes exchange of population a necessary and logical concomitant of Pakistan which he concedes in respect of limited areas. But exchange of population is to many a staggering and baffling problem. Dr. Ambedkar, however, thinks that to regard the problem in that light "is the sign of a panic-stricken mind. If the matter is considered in a cool and calm temper it will be found that the problem is neither staggering nor baffling".[13] References are made in this connection to the exchange of peoples between Turkey and Greece and between Bulgaria and Greece after the first World War. It should be remembered that the exchanges just referred to involved

[13] Pakistan or Partition of India, p. 377.

a comparatively small number of people. Even then "the repercussions of the economic dislocation and of the social disturbance caused by these movements (of population) were still being felt when the present (1939) War broke out" (i.e. after twenty years). Sir John Hope, formerly Vice President of the Greek Refugee Settlement Commission, has in fact pointed out as a warning that this transfer "involved an appalling amount of misery and hardship".[14] Another writer corroborates it and observes: "The migrations of the past—the flight from the Huns leading to the first migration, the flights and expulsions of Christian populations during the Balkan Wars—have been full of terror and misery. The one comparatively successful mass transfer of modern times—between Turkey and Greece—has been attended by terrible dislocation and hardship". He quotes Lord Curzon in this connection to emphasise that compulsory transfer of population is "a thoroughly bad and vicious solution".[15] It should not be forgotten that population involved in India is far larger than any ever involved in past European migrations. In Sind alone, whose population is by Indian standard very small, more than one million three hundred thousand non-Muslims will have to be deprived of their hearth and home to which they have been accustomed for generations and shifted else where. Such uprooting of huge bodies of people from their familiar surroundings and habitual ways of life and their transplantation to distant unfamiliar places and environments must be an experiment attended with tremendous economic and moral suffering. In recent times we have of course on many occasions experienced such suffering and it is not altogether improbable that considerable shifting of people will take place in the near future. But the contemplation of a mass transfer of millions of people and of their settlement in new places and surroundings is appalling.

[14] See Political Quarterly, Dec. 1943.

[15] The Fortnightly, May 1944.

So if the establishment of Pakistan is to be attended with a compulsory exchange of population, the idea appears to be a mad one. But if Pakistan is established and exchange of population does not take place, it will involve the reduction to to virtual helotry of millions of non-Muslim population in Pakistan territories. The only way out of this dilemma lies in unstinted opposition to the installation, either in the North-West or in the North-East, of a Pakistan State. There are people who may not be yet convinced that the establishment of Pakistan necessarily involves the position of a helot for its non-Muslim residents. They will refer to paragraph 4 of the Pakistan Resolution adopted at the Lahore Session of the All-India Muslim League in 1940, which provides for effective and mandatory safeguards for the rights of minorities. They may also refer to Mr. Jinnah's offer of protecting such rights in his speeches. But these promises of protecting minority rights and interests need not necessarily be taken seriously in in the light of recent happenings in India. It is significant that the Muslim League which adopted the Lahore Resolution has not yet thought it right to draw up in details those "effective and mandatory safeguards" which was supposed to be in its contemplation. Besides, if the Muslm League was convinced that such safeguards were enough for the minority population, it might have advised the Muslims to remain in undivided India subject to their enjoyment of such safeguards there. But instead it has issued the clarion call for separate Muslim states in what it describes as Muslim Homelands. Necessarily the non-Muslims in these territories are suspicious of this emphasis on "Muslim Homelands" and the "Muslim states" to be established there. In a speech in November, 1940 Mr. Jinnah urged the Hindus to "agree to divide India into Hindu Homeland and Muslim Homeland".[16] Again in another speech at Bombay in January, 1941 Mr. Jinnah

[16] Speeches and Writings p. 178.

observes: "What the Muslim League wanted was that the Muslims should have opportunity to have their own governments in the two zones which they considered as their Homelands and develop their own culture."[17] Nowhere he refers to any participation in these governments in Pakistan territories of non-Muslim inhabitants. In fact Mr. Jinnah himself made the position clear in a speech on the 16th November, 1942 at Jullundur—a speech to which further reference will be necessary later. In this speech he characterised the minorities as sub-national groups.[18] They might expect protection from the Government but nothing more.

"Muslim Homeland" is Dar-ul-Islam in which the Muslims alone govern the State according to Islamic laws and tenets and in which none but the Muslims have any *locus standii*. People who do not conform to Islam may be suffered to continue as residents there under certain conditions but they cannot have any part or lot in the superior branches of administration. In a Muslim State, observes Sir Jadunath Sarkar, "the civil authorities exist solely to spread and enforce the true faith. In such a State infidelity is logically equivalent to treason, because the infidel repudiates the authority of the true King and pays homage to his rivals, false gods and goddesses.....Therefore the toleration of any sect outside the fold of orthodox Islam is no better than compounding with sin.....The conversion of entire population to Islam and the extinction of every form of disent is the ideal of the Muslim State. If any infidel is suffered to exist in the community, it is as a necessary evil.....a non-Muslim, therefore, cannot be a citizen of the State; he is a member of a depressed class; his status is a modified form of slavery".[19] Such a Muslim State had been worked in In-

[17] *Ibid*, p. 209.
[18] This speech is quoted in Ambedkar—Pakistan, p. 373.
[19] History of Aurangzeb, Vol. III. Chapter XXXIV.

dia during all the centuries of the Delhi Sultanate and during most of the period of Mughal rule in India. In Akbar's time its basis was largely changed and the change, though modified, was not altogether obliterated during the two subsequent reigns. But Aurangzeb reverted with a new zeal and enthusiasm to the old ideal of the Muslim State.

Though this experiment of Aurangzeb resulted in ultimate disruption of the Mughal empire, the Indian Muslims continued to cherish the ideal. After the fall of the Mughal Empire, Muslim rule gradually disappeared and gave place to British administration which became in time securely established throughout India. But the ideal of Dar-ul-Islam continued all the same to sway the mind of the Indian Musalmans. This was illustrated by the rise of the Wahabi movement in the 19th century. Abdul Wahab, the son of a petty Nejd Chief, was, when on pilgrimage to Mecca, struck deeply by the profligacy of his fellow pilgrims and started a movement for reforming Muslim society in Arabia. His object was to revive the old ideals of the Muslim State in all their pristine purity.[20] The movement was carried on with vision and vigour and survived the death of Wahab which took place in 1787. Sayyid Ahmed, an Indian Muslim, born one year before the death of Wahab, became infatuated with the ideals of this movement, when he went on a pilgrimage to Mecca. On return to India he made it the mission of his life to make India an Islamic State of Wahab's ideal. The movement which he started became widespread in India during the fifty years between 1820 and 1870. It held the imagination of a large section of the Muslim population in this country during this period and inculcated afresh in the Muslim masses the ideal of Dar-ul-Islam.

The Wahabi movement was ultimately crushed by the

[20] W. W. Hunter—The Indian Musalmans, 1871, p. 55.

British Government because its ideals were inconsistent with British supremacy in India. After it was crushed, there intervened a period during which the Muslims could do little to realise their ambition of being governed only according to Quoranic laws. But, as we have seen, their hopes must have been roused by events leading to the introduction of Morley-Minto Reforms and by the provision which such Reforms made for their being regarded as a distinct entity and for their being represented as such in legislatures through separate electorates of their own. Later, after the first World War, the Khalifat movement released forces which prepared the ground afresh for a Muslim demand for an Islamic State in India. During the zenith of that movement Maulana Muhammad Ali observed in course of his trial at Karachi, "Speaking as a Musalman, if I am supposed to err from the right path, the only way to convince me of my error is to refer me to the holy Quoran or to authentic traditions of the last prophet—on whom be peace and God's benediction—or the religious pronouncements of recognised Muslim divines past and present." In other words he would not like to live in a State in which the laws would deviate even slightly from old Islamic laws and traditions. He would judge an action right or wrong only by the standard of such laws and traditions. Many of those who are advocating Pakistan hold the ideal as set by the late Maulana. Naturally no non-Muslim could be reconciled to the establishment of a separate State in India which would be run on this exclusive basis. Not to speak of the non-Muslims even Shia Muslims have been perturbed by the new ideal held aloft by the Muslim League. This is evidenced by the correspondence which passed between the President of the Shia Political Conference and the President of the All India Muslim League. The former observed in a letter: "Several attempts have been made to propose from the Muslim League platform that the government in

Pakistan should be modelled on the lines of the Government that prevailed in Arabia just after the Prophet's death. Although it is realised that it is not possible to put the clock back by so many years, yet it is feared that this may be an attempt to curtail the freedom of religious rights and observances which have been enjoyed by the Shias hereto fore."[21]

If the Shias may have reasons to be perturbed, how many times more the non-Muslims should have reasons for apprehension. Mr. Jinnah has not of course expressed himself specifically in favour of his Muslim State being governed according to the Shariat. But he has said that in Pakistan the Muslims will constitute the nation and the non-Muslims will be mere minorities or at best only sub-national groups whatever they might mean. By this he must have indicated some distinction to be observed between the political position of those who are Muslims and the status of those who are not. Secondly, it should be emphasised that Mr. Jinnah has during the last few years run persistently and doggedly a crusade against democratic form of government. He of course says that the object of his attack is western democracy. But that being the only democracy we know of he has by this crusade evidently banned democracy from his conception of government in Pakistan. In his article in Time and Tide referred to above he declared western democracy as "totally unsuited for India". He returned to the attack in his speech at the Aligarh Muslim University Union. Again in a speech at Ahmedabad in December, 1940 he says "Democracy did not exist anywhere in the World in the strict sense of the word. Even in England it was the ruling class that governed, but in India even such a democracy was not possible".[22] That was the age of Hitler and Mr.

[21] See Amrita Bazar Patrika, October 24, 1944.

[22] Speeches and Writisgs, p. 206.

Jinnah was appropriately speaking in Hitlerian tone. In fact the emphasis on Muslim Homeland, Muslim State and Muslim Nation, relegation of non-Muslims to the status only of minorities or at best of a sub-nation and lastly the crusade against democracy lead only to one conception of government and that is Muslim totalitarianism. None except the members of the Muslim League will subscribe to this ideology. As the territories earmarked for inclusion in Pakistan belong as much to non-Muslims as to Muslim residents there, the former cannot but oppose the Pakistan movement with all the emphasis at their command. They would do otherwise only to stultify themselves completely and become mere hewers of wood and drawers of water.

Apart from the basic character of Pakistan as contemplated by its sponsors and supporters, there are other grounds equally weighty for non-Muslim opposition to its establishment. The acceptance of Pakistan principle and its practical application to some areas will throw the whole country into a melting pot. It will supply the inspiration to Muslims elsewhere in India for pushing their separatist demands. It should be borne in mind in this connection that there are Muslims who in their schemes for partition of India demand for Muslim rule the State of Kashmir because its inhabitants are mostly Muslims though the ruler is Hindu and the State of Hyderabad because the ruler is Muslim although the population is overwhelmingly Hindu. They also have eyes upon that belt of territory which runs from Delhi to Lucknow not because the population there is largely Muslim (in fact Muslim population is a small minority) but because the territory is regarded as being of cultural importance to the Muslims. They have also put forward a demand on occasions for a corridor through northern India so as to connect the eastern and the north-western Muslim Homelands. They have further made a

demand for northern cities of India being declared as free cities.[23]

These different demands were raised when the Pakistan proposal was first mooted. Now of course there is concentration on demand for Muslim States in the North-West and North-East but a concession made in this direction is not unlikely to revive the other demands. Consequently, it may be repeated that the establishment of Pakistan will not be the end of the political and constitutional tangle in India. It will be in more than one sense the starting point of a fresh tangle.

Even if the establishment of separate Muslim States in the North-West and North-East does not lead to further complication, the partition so effected will make the problem of Indian administration difficult and intricate. That India is a geographical unity is not merely a phrase. India's defence can be oganised effectively only on an all-India basis. In fact it has been so organised up till now. Partition will disrupt that organisation and make a new system weak and precarious. In case of partition both the land frontiers of India in the North-West and North-East are likely to be included in Pakistan states but simply because they will be so included, Hindustan will not cease to be interested in proper arrangements for their defence. So far a good deal of attention has been paid by the Government of India to maintain an elaborate system of defence in the North-Western frontier. The question is whether the Pakistan Government of that area will have the same interest to keep up this system. Much will depend on its foreign policy and much on its economic resources. In case one or the other dictates any slackening of efforts in keeping up proper defence of the frontier, that may not affect merely the interests of Pakistan but equally those of Hindus-

[23] For these schemes, see R. Karim—Pakistan Examined, 1941. Appendix I

tan. In fact it is unlikely that Hindustan and Pakistan will look at the wider world in the same light and with the same outlook. Necessarily this difference in approaches towards foreign countries will involve a difference in defence policy. But India's defence cannot be properly organised without all parts of the country being interested in it in the same manner and to the same extent. It is really undeniable that proper defence of India presupposes an undivided country.

As in defence so also in many other vital matters India is a unity which cannot be destroyed without detriment to the interests of all parts. The famine of 1943, for instance, brought home to all right thinking men the interdependence of different Indian provinces in matters of food. There is then the question of economic and financial resources. If pooled together on an All India basis, they may certainly support a strong Government properly armed and ready to meet an emergency, internal or external. But in case India is divided into two or three states, none of them are likely to have sufficient resources of their own. There are people who have given it out as their opinion that Pakistan territories will have sufficient resources to maintain their governments in financial solvency. Dr. Ambedkar is one of them. The Sub-Committee of three set up by the Sapru Committee was divided in its opinion about it. Mr. Nalini Ranjan Sarkar was in the minority of one in holding that the Pakistan governments could not be really solvent. "Considering the economic and financial implications of Pakistan," he observed,[24] "the conclusion is irresistible that Pakistan is not a practical proposition, either economically or financially". His two colleagues Sir Homi Mody and Dr. John Mathai, however, came to the opposite conclusion. But it should be emphasised that in certain important and vital matters they

[24] Constitutional Proposals of the Sapru Committee, Appendix III.

counted on it that there would be a system of close cooperation between Hindustan and Pakistan. If such co-operation was not forthcoming, the Pakistan states could not in their opinion cope with all the demands with which as independent states they are likely to be confronted. Sir Homi actually clarified his views by pointing out later that Pakistan would be economically practicable "if problems of defence and economic development are not taken into consideration."[25] In other words Pakistan will be in a position to make both ends meet provided it had not to foot its own defence bill and it had not to introduce any improvement in the existing standards of living. There are many states in the world no doubt whose resources are far less sufficient than what the Pakistan territories may command by themselves. But it is no use adding to the number of states in which the people will be condemned to eternal backwardness. On the other hand if Indian unity is maintained there is a chance of all parts of the country becoming increasingly prosperous under the fostering care of a strongly resourceful and benevolent Government.

Apart from the problems of defence against external attack and those of financial solvency and strength there may arise in case of division many internal problems which will further complicate our affairs and fritter away our energy and resources. Kautilya observed more than two thousand years ago that neighbouring states could only become rival and hostile states. In fact it will be too optimistic to think that there will be peaceful relationship between Hindustan and Pakistan States created on an independent basis in this country. They are rather likely to develope a spirit of rivalry and hostility. If religion has been the source of bitter quarrels between communities living under the same Government, it will be idle to think that it will

[25] *Ibid*, p. 145.

cease to have its explosive effect when each of the communities will have a state of its own. It should be remembered that groups of minorities will continue to remain in each state and any ill treatment, real or supposed, they might receive at the hands of their Governments will poison the atmosphere and call for retaliation and reprisal. Disputes about boundaries may also become frequent and complicate their relationship. Internecine fights between Indian States may not therefore be ruled out.[26]

Again if the Muslims could secure states of their own merely by calling themselves a nation, it is unlikely that their example will not be imitated by other groups in this country who also may have developed sufficient solidarity and cohesion among themselves. Sometime ago a damand was actually put forward in some public meeting in the Province of Madras for establishing a separate independent State in South India to be known as Dravidistan. In the report of the proceedings of one of these meetings we find its President pointing out that "If they had decided to concede the right of self-determination to one nationality in the North, it could not be denied in respect of the Dravidians in the South."[27] The Sikhs in the Punjab who have been staunch advocates of Indian unity have also pointed out in no uncertain terms that if Pakistan is conceded to the Muslims, Sikhistan should be conceded to the Sikhs in the Punjab. As one prominent Sikh observed when C. R. formula was being hotly discussed in the country in 1944: "If partition of the country is finally decided upon Sikhs will insist on having a 'Sikhistan' in the Punjab".[28] So there

[26] El Hamza in *Pakistan: A Nation (Lahore, 1941)* observes that in case people in Pakistan areas do not receive adequate cooperation in establishing their separate state, "The Paks will then even look westward for alliances and friendships and Pakistan (he means North-West Pakistan) and her Indian neighbours will become hereditary enemies." p. 130.

[27] Statesman of 26/8/44.

[28] Statesman of 4/8/44.

is the risk of all the centrifugal forces in this country being encouraged and stimulated by the establishment of Pakistan and they may engulf not merely Hindustan but Pakistan as well.

Mr. Jinnah has of course no patience with any cultural, religious or linguistic group raising the cry of self-determination in his Pakistan areas. In 1942 when it was suggested that there might be other groups besides the Muslims who might demand self-determination and independence, he flew into a paroxysm of rage and observed: "The latest trick—I call it nothing but a trick—to puzzle and to mislead the ignorant masses purposely, is, why should the right of self-determination be confined to Muslims only and why not extended to other communities? Having said that all have the right of self determination, they say the Punjab must be divided into so many bits; likewise the North-West Frontier Province and Sind; thus there would be hundreds of Pakistans. Who is the author of this new formula that every community has the right of self-determination all over India?.....Let me give them a reply that the Musalmans claim the right of self-determination because they are a national group on a given territory which is their Homeland and in the zones where they are in a majority. Have you known anywhere in history that national groups scattered all over have been given a state? Where are you going to get a state for them?[29] These last questions may very well be put by any non-Muslim to the Muslim League and its leaders. Are not the Muslims scattered all over India? Are not even the territories where they are in a majority the Homeland as much of theirs as of their non-Muslim inhabitants? If again the Muslims in spite of the diversity of language, diversity of racial affiliations and diversity of territories where they are in a majority can

[29] Quoted in Ambedkar—Pakistan, p. 373.

acclaim themselves as a national group only on the ground of their religious solidarity, where is the wrong in the Sikhs who are united by language, race religion and territory claiming nationhood and self-determination for themselves?

In fact Mr. Jinnah's thesis regarding Muslim nation and self-determination is as flimsy as a similar thesis, propounded by any other group in India for the same purpose, may happen to be. It is of course true that we would not quarrel with the Muslims if they call themselves a nation, although many of the essential ingredients of nationality are lacking in them. For it largely depends on a feeling of solidarity whether a group will call itself a nation. But it should be emphasised that simply because a group calls itself a nation, it must not necessarily have the right of self-determination and the permission to constitute itself into a separate independent state. A recent writer observes: ".....can it reasonably be believed that the national demands of Wales, White Russia, Alsace or Flanders, would be met or should be met by the granting of political independence? Should French Canada self-determine itself as a separate state?.....Must the Copts in Egypt claim a self-determination that they do not want from the Arab population in the midst of which they live. In short are there not geographical, historical, economic and political considerations which rule out self-determination in the form of the sovereign state for many of the smaller nationalities of the world?" If any of these nationalities cry for self-determination in spite of valid objections against it, this author would remind it of the words of Burke—"If we cry like children, for the moon, like children we must cry on". He concludes by pointing out that "The right of self-determination, therefore, if it means anything at all, cannot mean an absolute right to complete national sovereignty."[30]

[30] Alfred Cobban—National Self-Determination, pp. 73-74.

In this connection the observations of one other distinguished man may be quoted. "It was clear", says Professor Carr, "that the political right of self-determination must be conditioned and restricted not only by military necessity, but by the exigencies of economic interdependence."[31] So even if the Muslims in India were a nation they would not automatically have the right of self-determination. In fact military necessity, the exigencies of economic interdependence, and geographical and other considerations rule it out.

There are many in this country who have been influenced in the direction of Pakistan by the example of the Constitution of the Union of the Soviet Socialistic Republics. It concedes the right of secession to the Union Republics which are organised on the basis of their separate racial and linguistic traditions. But it should be emphasised here that this right is more apparent than real. For, as a writer puts it, "Its exercise would be tantamount to a successful counter revolution," [32] which is an impossible proposition. In fact the Constitution of 1936 incorporates this right only as a theoretical concession to the history of Soviet policy in respect of the national question. It is not necessary here to enter into the details of this history. But it is pertinent to point that the Bolsheviks by way of winning over to their side the non-Russian nationalities in the Czarist empire decided to grant them the right of self-determination. Later, however, when these areas actually seceded it was found to what extent this secession complicated the military and economic situation. But still the right of secession was not theoretically withdrawn but really confirmed in the Constitution of 1936. It was, however, to be known that it was "a sop to the *armour-propre* of the nationalities in the Soviet Union" than a real right to be exercised in practice. The right is, as an author, already quoted, puts it: "You have the right of seces-

[31] Quoted in W. Friedmann—The crisis of the National State, p. 41.
[32] W. Friedmann in The Fortmighty, May, 1944.

sion: this is an inherent right which we recognise in you by virtue of your national status. In fact, however, military and economic considerations make it impossible for you to exercise the right. Nevertheless we proclaim it, as a sign of equal partenership in the Union".[33] In view of this, it will be singularly unwise to follow the theoretical provision of the U.S.S.R. Constitution and grant on its model the right of secession to any province or region from the Union. In the U.S.S.R., the government is so organised as to make ineffective any movement for secession. But in India where the system of government will be different, if there is a provision in the Constitution for the secession of any unit and if under that provision a movement is set on foot for the exercise of this right it will not be as easy as in the U.S.S.R. to deal with it.

Pakistan is not only no solution of any of the existing communal and governmetal problems but it will inevitably create new problems which will complicate the economic, political, religious and military and strategic questions of the country. In view of this, those responsible for the future constitutional system of India should not hesitate to reject the Pakistan plan. But the apprehensions which the Muslims may have in respect of the protection of their cultural and religious interests must be removed and to this end the constitution should be so framed as not only to provide effective safeguards against any encroachment on these interests but also to make it possible for Muslims in those areas where they are in a majority to have an opportunity of sharing in full in the administration of local affairs. So while the constitution should include provisions for an effective enjoyment of fundamental rights and minority privileges, it should be also federal in character with the units exercising jurisdiction over all functions which are not regarded as essential for the Union Government.

[33] Cobban—National Self-Determination p. 108.

CHAPTER VIII

POWERS OF THE UNION GOVERNMENT

What powers will be assigned to the Government of the proposed Indian Union and on what basis will be exercised the remaining powers of government in the country are the most fundamental questions which confront the Constituent Assembly. It is very unfortunate that this Asssembly will be considerably handicapped by the proposals made by the Cabinet Mission in paragraphs 15 and 19 of their Statement of the 16th May, 1946. These proposals have necessarily become the basis of discussion in the Constituent Assembly and although it is fully entitled to go beyond these proposals and make, in this regard, any decision it may think fit, it is unlikely that there will be any violent departure from the recommendations made by the Mission. It is but common experience that once discussion starts on the basis of some concrete proposals, decisions emerging out of such discussion and debate do not differ fundamentally from the original proposals, though in details amendments may be accepted. Secondly, it should be remembered that any amendment of the Cabinet Mission Proposals in this respect will require the consent of a group in the Assembly in whose interests these proposals were framed in this particular way*. So, we should not be very optimistic as to the soundness of the decision which the Constituent Assembly may be required to take with regard to the powers and functions of the Union Government and the

*In the event of the Muslim League finally deciding not to join the Constituent Assembly and insisting on the division of India. these limitations will not apply. But the attitude of the States joining the Constituent Assembly will be an important factor in the formulation of Union Powers.

relations which should subsist between this Government and the provincial units. But there is not only no harm but considerable utility in enumerating and emphasising, in the following paragraphs, those powers and functions which should indispensably be allocated to the Union Government, if that Government is to justify its title and if the country as a whole is to survive as a national unit. It will be worthwhile also to refer to other items of power which should either be directly included within the ambit of Union jurisdiction or should be indirectly under its control so that the country may not be unduly handicapped in making moral and material progress.

In this connection, we should examine the list of powers conferred upon the Central Government in the Unions like the United States of America, the Dominion of Canada and the Commonwealth of Australia. It should be remembered that sectional forces in the territories covered by these Unions were as strong as now noticeable in India. But, all the same, when they formed the Union, they had to make over to the Union Government definite powers in certain fields. Otherwise, they thought this Government would be ineffective and the Union would be worse than useless. In the United States, particularly, localism was still so powerful that the Union could be formed only "with the express purpose of meeting the general exigencies of the people". Consequently "the obligations and the claims of the Federal Government were simple and easily definable". In fact "the Government of the States remained the rule, and that of the Confederation became the exception".[1] But even then this Government which was to be the exception rather than the rule had to be endowed among other powers with the following:

1. Taxation without limitation of heads.

[1] Quotations are from Alexis De Tocqueville—Democracy in America (Vol. 1, Chap. VIII).

2. Conduct of foreign relations, including the receiving and sending out of diplomatic ministers and the making of treaties.
3. Declaration of war and taking all necessary steps in its support including the raising of armies and the maintenance of a navy.
4. Regulation of commerce with foreign nations and among the several states and with the Indian tribes.
5. Coining money, regulating the value thereof and of foreign coin and fixing the standard of weights and measures.
6. Establishing post-offices and post-roads.

From what are enumerated above it will be clear that the Federal Government of the United States was given definite power to manage external affairs of the country, organise its defence, enter into commercial treaties with other nations, impose tariff duties upon articles coming from outside and regulate the currency of the country. It should be emphasised also that not only the Federal Government was given jurisdiction over such affairs as foreign relations and currency but State Governments were virtually prohibited from having anything to do with them.[2] It should, further, be stated, in connection with tariff, that not only external customs were to be regulated by the Government of the Union alone but in view of the fact that "commerce among the several states" was included within the federal jurisdiction, inter-state barriers through customs tariff were made out of the question.[3] It will be noticed that in the field of communications there is reference only to post-offices and post-

[2] Sec. Art. I. Sections 8, 9, 10 and Art. II Sec. 2 of the Constitution.

[3] A new kind of inter-state trade barriers through the exercise of Spending and Police (Public Health) powers of State Governments has been prominently noticeable of late. But the people of the United States are alive to the danger it represents. See Chap. XVI (Inter-State Trade Barriers and Federation) in N. C. Roy—The Federal System of the U.S.A. (University of Calcutta, 1940).

roads. But, as the Constitution was framed in the 18th century, which was a horse and buggy age and knew no railways and far less any airways, there could be no reference to them as items of power under federal jurisdiction. In order that the Federal Government might later exercise control over these items of communication, it was not, however, necessary to amend the Constitution. By way of regulating inter-state commerce, it could assume adequate control over these spheres as well.

It is true again that while currency was made a federal function, there was no reference to banking. But the Congress was empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers...."[4] This "necessary and proper" clause as also the "general welfare" clause in subsection 1, Section 8 of Article 1 helped considerably in the extension of federal power in the future. We need not go into them here. But it is appropriate to point out that under **the necessary and proper** clause powers which were not explicit but only implied in the Constitution could be exercised by the Federal Government as occasions might arise, and, actually by the exercise of such an implied power, the Federal Government made several experiments with a national bank and, then, in 1913, established the Federal Reserve System which is the pivot of the American banking system to-day. So it may at once be said that the Government of the American Union could exercise jurisdiction immediately after its formation not only in the fields of foreign affairs, defence and communications but also in the fields of currency and banking and external and inter-state trade.

But as years passed and circumstances changed, even such jurisdiction proved inadequate. With the replacement of the 18th century civilisation by modern progress the

[4] Art. 1, Section 8, last sub-section.

Union Government had to come with increasing prominence into the picture. Not only that under new conditions, new functions demanded Govenment action, and this on a national basis, but old subjects like education and agriculture could no longer be tackled exclusively on a state basis. They, also, demanded central assistance and direction. So, step by step, the Federal Governmnet had to intervene in fields of activity which the founding fathers would have excluded without hesitation from central jurisdiction. Any idea that functions like the regulation of labour and provision of old age pension and unemployment insurance will ever be governmental in character and come within the jurisdiction of the Federal Government would have frightened them out of their wits. But then the modern age and its problems are so different from the conditions with which they were familiar in the 18th century. So if the constitutional history of the United States has any lessons for us, they are this that the Union Government in India, if it is really to be a government, must have at least the functions and powers which the U.S. Federal Government had in the days of Washington and if it is to be an instrument of modern progress in this country its power should be at least as comprehensive as those of the U.S. Government to-day. Modern problems require a modern remedy.

Lessons from Canada are equally unmistakable. The several provinces of British North America which were each immediately connected with the British Government at Whitehall and were not otherwise associated with one another by any ties of union were, by force of circumstances, constrained to enter into a federation in 1867, under the British North American Act of that year. Those responsible for fashioning this Act had been warned by the experiences of the United States. They were convinced that the Civil War of 1861-65 in that country was the direct outcome of the Federal Government which, though far stronger than

the Union Government proposed by the Cabinet Mission for India, was endowed with only few enumerated powers while the residue of governmental authority was vested in the states. Accordingly in Section 91 of the British North America Act it was laid down that the Dominion Government would be responsible for "the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces...." So only certain powers which were then thought to be only of local importance were specifically assigned to the Provinces (under Section 92). The rest were to be vested in the Dominion Government. But in order that the nature of these residuary powers of the Dominion Government might be properly understood and appreciated, twenty items were enumerated in Section 91 of the Act. It was, however, specifically stated that these items were enumerated not to restrict the scope of the residuary authority of the Diminion Government but only to illustrate it. In the list of such illustrative powers, there was no reference to External Affairs as such*, although when the Commonwealth of Australia Act was passed more than thirty years later, External Affairs was specifically mentioned as an exclusive Commonwealth subject. This omission should be explained by the fact that at the time the British North America Act was framed, foreign affairs in all the colonies was in charge of the British Government at Westminster. But, as Dominion autonomy was extended to this sphere, it came automatically under the jurisdiction of the Dominion Government. In any event, while "External Affairs" was excluded for this obvious reason, the list included such important items of power as Regulation of Trade and Commerce; Postal Service; Militia, Military and Naval Service and Defence; Currency and Coinage; Banking, Incorporation of Banks and the Issue of Paper Money;

*But reference should be made to Section 132.

Legal Tender; Bankruptcy and Insolvency; Criminal Law including the Procedure in Crimial Matters; Naturalisation and Aliens.

Mere mention of these items is enough evidence that the fathers of the Canadian federal system were determined to guard against the weakness of the United States. Regulation of trade and commerce was, for instance, not limited to external and inter-provincial trade. It was intended, evidently, to be without such limitation. Regulation of banking was again not left to a chance interpretation of central power, as in the United States. This responsibility was specifically vested in the Dominion Government. Criminal law and procedure whose diversity was such a source of weakness to the U.S.A. was again made a central responsibility. In fact, Sir John Macdonald, the chief architect of the Canadian federation, observed in course of the debate on Quebec Resolutions which were the basis of the British North America Act: "We have conferred on them (the Dominion Government), not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest, not distincly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature. We have thus avoided that great source of weakness of the United States".[5]

But Sir John and his colleagues made one mistake. They made two lists of powers. That for the General Government was no doubt, as it has been pointed out already, only for purposes of illustration. But all the same it was a list of powers. The second list was a specific one for the provinces. These lists were prepared in a way which gave rise to trouble in the future. First, one of its items (item 16 which is the last in the list embodied in Section 92) reads,

[5] Debates on Confederation pp. 33.

"Generally all Matters of a merely local or private Nature in the Province". This item aroused the pretension of the provinces that they had also residuary jurisdiction. In other words the residuary authority of the Dominion Government, as envisaged in Section 91, was not to be regarded as absolute but qualified. The Dominion Government would enjoy residuary authority in the general sphere while the provincial governments would not have their jurisdiction limited to the items enumerated in Section 92 but would also have jurisdiction in non-enumerated matters provided such matters were only of a local character. Secondly, in the list enumerated for provincial jurisdiction were such items as "The Incorporation of Companies with Provincial Objects" and "Property and Civil Rights in the Provinces".[6] Now federalism is legalism. Whenever there would be a dispute whether this Government or that was to undertake a particular responsibility the matter would be referred to the courts for decision. For Canada, the ultimate tribunal to decide such disputes was the Judicial Committee of the British Privy Council which, under the inspiration of such men as Lord Watson and Lord Haldane, interpreted the British North America Act not as a constitution but as a statute.[7] Consequently in interpretation, the needs of a growing nation were not considered at all. What was more, by the decisions which the Privy Council issued from time to time, the intentions of the framers of the British North America Act were set aside and a new meaning was read in the distribution of powers, as embodied in Sections 91 and 92 of the Act. The result is that to-day jurisdiction of the Dominion Government over many important subjects has become debatable. In consequence this Government has no power to undertake legislation to ensure "a basic minimum of social secu-

[6] Items 11 and 13 in Section 92 of B.N.A. Act.

[7] See W.P.M. Kennedy—The British North America Act: Past and Future, in the Canadian Bar Review. Vol. XV. No. 6.

rity for every citizen". If the Privy Council had not been so narrow in its interpretation of the Act, the Dominion Legislature would have been entitled to adopt measures to introduce unemployment insurance, regulate minimum wages and determine maximum hours of work. But now that the Dominion Government has been declared to be without jurisdiction in these fields,[8] they are left to the discretion of the Provincial Governments, which are, however, unfit, on more than one ground, to tackle such problems.

Now, the Dominion Government in Canada has powers of unlimited taxation, receives and sends out ambassadors and ministers and otherwise manages the foreign relations of the country, determines its currency and banking system, deals with trade with other countries and stands in the way of inter-provincial trade barriers, organises national defence, declares war and in war-time has absolute right to mobilise national resources in every way it desires, is in charge of naturalisation and aliens, regulates marriage and divorce and unifies criminal law and procedure. So, even to-day, after all that the Judicial Committee of the British Privy Council has done to neutralise the centralising features of the Act, the Dominion Government is not only not a cipher but is a very powerful institution. But simply because subjects like social legislations, as have been referred to above, are now outside its purview and as without central authority over this sphere national solidarity and democratic progress are being arrested half way, there are thousands of thinking Canadians who are deploring this situation and demanding some way out either by suitable amendments

[8] In January 1937, the Judicial Committee of the Privy Council declared ultra vires (i) The Weekly Rest in Industrial Undertaking Act, 1935; (ii) The Minimum Wages Act, 1935 (iii) The Limitation of Hours of Work Act, 1935 (iv) The Employment and Social Insurance Act, 1935. Unemployment Insurance has, however, been vested in the Dominion Parliament by the British North America Act, 1940. See K. C. Wheare—Federal Government (1946) p. 141.

of the Act or by any other desirable method. The chagrin of some may be well illustrated by the title of the pamphlet which embodies the "Brief" submitted by the League for Social Reconstruction in 1937 to the Rowell Commission on Dominion-Provincial Relations. It was entitled "Canada-One or Nine?" The idea pervading the thesis was that unless wider powers, particularly in respect of social legislation, were definitely assigned to the Dominion Government, national unity would be destroyed. The powers still exercised by the Dominion Government were good so far as they went. But in the modern world they were insufficient to meet national needs. Now, if this could be said of the Canadian Central Government, what should be said of a Central Government with jurisdiction only over External Affairs, Defence and Communications?

The Commonwealth of Australia Act was passed by the British Parliament in 1900 and the Commonwealth Government of Australia was empowered by this Act to exercise exclusive jurisdiction in certain vital matters, and concurrent jurisdiction in certain other important fields of activity. It conferred exclusive jurisdiction upon the federal authority in respect of external affairs, naval and military defence, coinage and legal tender, seat of government of the Commonwealth, and duties of customs and excise. Secondly, it made inter-state trade "absolutely free". It would not be open to the Government of any state to stop, check or interrupt the flow of trade to another state by any means. Thirdly, it assigned to the Commonwealth Government concurrent jurisdiction in respect of communications, banking, insurance, trade and commerce with other countries and among the states (excluding the levy of customs duty which, it may be repeated, was to be of exclusive Commonwealth jurisdiction), marriages and divorce, immigration and emigration and taxation?[9] In regard to concurrent

[9] See Part V, Chap. I of the Constitution.

jurisdiction, the principle adopted was that "when a law of a state is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".[10]

So not to speak of the exclusive sphere, in the concurrent field also the Commonwealth Government might move as it pleased. Heads of revenue, it should be particularly emphasised, were not limited for the Federal Government. Tariff and excise would of course be exclusive heads for this Government but as in Canada and in the U.S.A. it would have unlimited jurisdiction to tap other sources as well. So, it can be said at once that the Commonwealth Government of Australia is a Government of wide powers at all times and during a period of war by way of exercising its defence powers it can make its authority all-pervasive as in Canada. But even then many responsible people are of the view that central jurisdiction should be further widened in order that modern problems might be properly tackled. The Commonwealth of Australia Act only provides that Old Age and Invalid Pension is to be regarded as of concurrent jurisdiction. Consequently, legislation in respect of other social services is exclusively within State jurisdiction. But such legislations to be effective have to be undertaken only on a central basis. So already several constitutional amendments have been proposed so as to confer further authority upon the Federal Government.[11] This illustrates that wind blows in Australia in the same direction as in the U.S.A. and Canada.

India, also, is not outside the modern world. The same forces which operate in countries referred to above operate in India. Problems which face the public in the U.S.A., Canada and Australia face the public in India and have to

[10] Sec. 109.

[11] The Round Table, June, 1946.

be tackled on the same basis as in other federations. Traditions of India and its recent experiences only strengthen, and not weaken, the lessons we have to learn from overseas. Indian traditions point unerringly to the fact that without a strong central government, not only the outlying parts may gradually fall away from all central direction and control but what is more the whole country may be engulfed in anarchy and ruin. That this is no figment of imagination of an alarmist is testified to as much by the experiences of the 18th century as also by what is happening to-day in provinces like Bengal. Centrifugal and even anarchical forces have always been powerful in this country and even when the Central Government remains strong they are only scotched but not really killed. Constant vigilance becomes necessary to keep them under control. They remain lurking in every nook and corner and with the slight withdrawal of central vigilance they come out into the open and destroy all that has been garnered by patient labour during years of peace. It is on this account essential that the Central Government should be equipped with adequate authority.

The Cabinet Mission proposed that the Union Government envisaged by them should have powers in respect of External Affairs, Defence and Communications and that it "should have the powers necessary to raise the finances required for the above subjects". The three items just referred to are no doubt essential and even indispensable for any central government worth the name. But they, by themselves, are not sufficient to keep the Union together. We do not know why the Cabinet Mission did not make any reference in its Statement of May 16, 1946 to trade and commerce and currency and banking. May be, they thought that they would follow from Foreign Affairs and Financial Power vested in the Union Government. It may also be that they thought that these func-

tions were not essential for the Union Government. Whatever the reason, they made a grievous error by excluding these functions from the list they prepared for the Union Government. By having jurisdiction over Foreign Affairs, the Union Government will be entitled to enter into treaties with other countries. But in case external trade was not in its hands, any commercial treaty that it may undertake may not be respected by the units. Secondly, it should be remembered that imposition of customs duty upon articles coming from another country is not necessarily to be regulated by treaty obligation. A country has an inherent right to impose such duties. Treaty obligations may only modify it. Now let us assume that because the Union Government has jurisdiction over Foreign Affairs, it has the right to enter into a commercial treaty with another country. This assumption may not be quite tenable.[12] Even if it is tenable, we may be confronted next with the question as to what would happen when we have no commercial treaty. In that case, certainly, the units and not the Union Government will be entitled to impose tariff duties. In other words, each unit will go its own way in regard to its imports and exports. Secondly, in the absence of any power of the Union Government over inter-provincial or inter-state trade, each unit would be entitled to tax imports from other units. So in the field of trade and commerce confusion, rivalry and anarchy will prevail.

The fathers of the American Constitution profited by their experiences of the Confederation in which such rival-

[12] In Canada the "Labour Conventions" Acts, 1935, e.g., The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and the Limitation of Hours of Work Act were passed "for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada under the provisions of the Treaty of Peace—" But as the subjects of legislation were regarded as being within provincial jurisdiction, treaty powers of the Dominion Government would not make its exercise of jurisdiction in these fields valid.

ry and confusion reigned supreme in matters of trade and accordingly they made trade with other countries and inter-state trade exclusive federal functions. Those who framed the Canadian and Australian constitutions followed in the foot-steps of these wise American statesmen. Indians, meeting at the Constituent Assembly, cannot do anything better than copy the example of their predecessors in the U.S.A., Canada and Australia. If they approve of the Cabinet Mission's ommision of trade and commerce from the Union list, they would stand the risk of taking India back to the 18th century and of creating in this country the confusion which, it may be repeated, obtained in America before the new Constitution went into effect there in 1789.[13] This will mean both national and international suicide for India. So trade and commerce, particularly their regulation with foreign nations and among the federal units, should be specifically made a federal subject.

In this connection, reference may be made to the discussions which were held in the Federal Structure Sub-Committee of the Round Table Conference at London in 1930-31. Some of the Indian States, like Hyderabad, Bikaner and Gwalior, which were to be included in the Indian federation, had enjoyed the right of imposing tariff duties upon articles coming into their territories from outside. A state like Travancore, again, had the right to impose duties upon exports from its territory. The question was whether these pre-federation privileges and rights might continue after the entry of these states into the Union. This question was answered by a British member of the Committee so effectively that his observations may be quoted in full. Mr. Gavin Jones said:

[13] See the Federalist (No. XXII, No. XLII). For discussions in the Melbourne Conference regarding the urgency of Federal jurisdiction over foreign and inter-state trade See B. R. Wise—The Making of the Australian Commonwealth, Chapter V.

"We are engaged in forming a great United States of India, and I will refer once more to one of the principles of Federation, namely that trade and intercourse between the Federated States shall be absolutely free. In all Federations, that has been a fundamental principle. I quite agree that we cannot go into details, but I would like the Delegates to come to the conclusion to agree to this fundamental principle, to be arrived at in some way or another. We do not want any injustice to be done to any State. The matter of revenue can be adjusted. Take the United States. If, when they federated, they had permitted any possibility of fiscal barriers being placed between the different States, they would not have been the great nation they are to-day, and I would like to put it before every one here that if we are going to have a real sound Federation we must agree on that principle."[14]

Just like trade and tariff, currency, coinage and legal tender should also be an exclusive Union subject. Without this power differenet parts of this country will have different currencies hampering trade and industry and blocking the economic progress of the country. There are some who think that jurisdiction over currency and coinage on the part of the Union Government is implicit in the financial power assigned to it by the Cabinet Mission. But even if jurisdiction over currency and coinage is implicit in Union power, as conceived by the Cabinet Mission, there is no harm in making such jurisdiction explicit by allocating this subject specifically to the Union Government. And if it is not so implicit, then there is all the more reason for stating categorically that it is an exclusive Union subject.

In regard to currency, coinage and legal tender, it should be known that this subject was within exclusive jurisdiction of the Central Government in the United States

[14] Report Vol. I, p. 119.,

even under the Articles of Confederation, though this Government, under these Articles, was a most feeble and rickety institution.[15] Then, when the federation was set up in the U.S.A., in 1789, under the new Constitution, this subject was without much of a discussion included within the federal jurisdiction. In Canada and Australia, also, there was little difficulty in allocating it to their respective Central Government. In the Federal Structure Sub-Committee of the Round Table Conference, already referred to, there was a discussion on the subject. So far as the delegates from the provinces were concerned, none of them could think of the subject being assigned to the provinces. There were, however, some States, e.g., Hyderabad, which had currencies of their own. Such curreneies were a source of both profit and prestige to them. But Sir Akbar Hydari, who represented Hyderabad, saw no objection to the subject being exclusively under federal control provided some means might be discovered by which the Hyderabad insignia might be inscribed on coins current in that State.[16] Now. however, it seems there is a demand in some quarters to put back the hands of the clock. But it may be repeated that if this demand is conceded there will be not only confusion in the country but we may have to bid good bye to all economic and commercial progress.

While currency, coinage and legal tender should be exclusively a Union subject, banking need not be within its exclusive jurisdiction. But the Union Government must have concurrent jurisdiction over this field and the Constitution must make a provision to this effect. It will not be wise to depend upon the implied powers of the Union for the central control and supervision over banking activities. The power must be specifically given to it. In the early history of the United States there are instances of a State Govern-

[15] See Article IX.

[16] Report, Volume I, p. 71.

ment interfering with the establishment, in the territory within its jurisdiction, of a branch of a bank chartered by the Federal Government.[17] It is not unlikely that in view of the communal and local feeling, now noticeable in the country, the Governments of some of the units may interfere in the same way with branch banking enterprises registered outside these units. This will hamper legitimate commercial and industrial activity. Secondly, in the interests of financial stability of the country there is necessity of banking activities in different parts of India being controlled directly or indirectly through a central bank chartered by the Union Government. If the United States could feel the necessity of the Federal Reserve System and if India to-day had to establish the Reserve Bank, who would say that, when the new Union is set up, there will be no necessity for such a Reserve Bank to continue?

It has been stated already that the Cabinet Mission would allow the Union Government to have "the powers necessary to raise the finances required for" the three subjects of Foreign Affairs, Defence and Communications. In other words, it seems that what the Mission wanted was to limit the source of Union revenue to certain definite heads, so that the Union Government might have only just such an income as to finance the three specific subjects allocated to it. But it should be known that defence in the modern days of total war may become too comprehensive a function to be financed from one or two limited heads of revenue. If such limitation is made, not only in time of war, the Union Government may find itself handicapped but active preparations to avoid such a war also may be frustrated. Consequently, it is but meet that the sources of Union revenue should be unlimited even for the proper discharge of this specific function. It should also be borne in mind that the Central Gov-

[17] A. C. McLaughlin—A Constitutional History of the United States. pp. 387-89.

ernments in the U.S.A., Canada and Australia have unlimited jurisdiction in respect of raising money. In this connection it should be known that only because of these unlimited financial resources, a Federal Government like that of the U.S.A. could by rules of grant-in-aid, or by other methods undertake new responsibilities when such responsibilities were forced upon it by the exigencies of modern circumstances. This does not mean that the Government of the units should be starved. There are certain heads of revenue which, of course, the Central Government alone should be entitled to utilise, e.g., tariff, excise (except a few heads of excise) currency and coinage, etc. But most fields of taxation may be within concurrent jurisdiction of the two Governments. Apart again from the facility which unlimited taxing power may confer upon the Union Government to discharge its defence and other obligations, as conceived by the Cabinet Mission, it will also provide revenues to that Government for undertaking direct or indirect responsibility in other fields, which the Cabinet Mission may desire to exclude from Union jurisdiction but which in modern circumstances can be properly and effectively explored only with Union direction and assistance.

In this connection, we may first of all refer to food production and distribution. The famine of 1943 and the shortage of food experienced since then are a constant reminder of the fact that various parts of India are very much inter-dependent in this primary field. Without central coordination which involves both advice and control, there can hardly be any solution of the food problem. Apart from coordinating production and supply in the country, the Union Government alone may act effectively in respect of inviting help from other countries of the world. In view of these facts, it is but essential that while Governments of the units should primarily be responsible for the regulation and development of agriculture, the Union Government must also have

adequate responsibility in this regard, particularly in respect of collecting statistics, promoting agricultural education and research, advising as to the kind of products to be grown, and offering financial assistance on the fulfilment of prescribed conditions. In regard to public health again the conditions are, on universal admission, appalling. While average male expectation of life in the United Kingdom is 59, it is only 27 in India. It should, therefore, be emphasised that if the country is to go ahead, public health problems can no longer be treated as cavalierly as they have been so far. They must be attacked on the basis of a comprehensive plan. To this end, the Bhore Committee, which submitted its report sometime ago, recommended that there should be a Health Ministry in the Central Government to co-ordinate the activities of the different provincial establishments.[18] Who will deny that the public health organisation to be effective in this country must have at its disposal this central direction and advice which Sir Joseph Bhore and his colleagues have recommended after due enquiry into Indian circumstances?

Education is usually regarded as only of local importance and it is thought that it can be dealt with effectively on local responsibility. This point of view is only partially true. In the United States, those who framed the Constitution included this subject in the residuary jurisdiction of the States. But almost from the beginning federal help in the shape of land grants for the maintenance of schools was encouraged. Then, from the early sixties of the last century, was started the system of federal grant-in-aid which was developed from decade to decade and which brought different aspects of education, as also many other subjects of public importance, within the purview of federal inspection, advice and even control. It was found that federal assistance was

[18] Report, Vol. II, Chapter III.

really indispensable if some kind of uniformity of development was to be desired in the Union. The resources of all the states were not the same. Those which had greater resources would provide better educational facilities and the states which were comparatively poor would lag behind. But federal help would mitigate this inequality of position to a great extent. Then, again, it is certain that the agricultural and mechanical colleges which did so much to povide technical skill in the country and thereby to further its progress would not have been in many cases started and certainly would not have been properly maintained without federal aid.

It will be singularly unwise in our country, which is now so backward in respect of education of every kind, to regard this subject as of provincial importance only and exclude, on that account, all advice, supervision and financial assistance from the Union Government. It is true that education has been a provincial subject since the Government of India Act 1919, was first in operation. But even under the Act of 1935 such cultural and educational objects as the Imperial Library, the Indian Museum, the Victoria Memorial, the Benares Hindu University and Aligarh Muslim University are under the direct control of the Government of India. So are the ancient and historical monuments and archaeological sites and remains. The Government of India has under the same Act also the right to establish federal agencies and institutes for research, for professional and technical training and for the promotion of special studies.[19] It is not necessary here to express any opinion as to the two universities, referred to above, being under the direct control of the Union Government or coming under the control of a provincial government. But, in the new dispensation, the Union Government ought to have the necessary power

[19] Seventh Schedule to the Govt. of India Act, 1935, List I (Items 11, 12, 13, 15).

not only to maintain the research and technical institutions which the Government of India have already set up and are now contemplating to set up but also to establish new institutes of this character. For instance, sometime ago a Committee was constituted to explore the possibility of establishing, in India, institutions like the M.I.T. The idea should be proceeded with and the Union Government should be given power and jurisdiction to this end. There is again, to-day, the Inter-University Board, whose object is to make an attempt at co-ordinating the activities of different universities of India. This Board might advise the Union Government in this regard and so advised this Givernment might, either by financial assistance or otherwise, help in raising the standard of higher education and co-ordinating the activities of different establishments maintained in different provinces to this end. Nor should Union power in respect of education be limited only to research, to professional institutes and to universities. It should be extended, in certain matters, to secondary and even primary education. If the recommendations of the Sargent Committee are to be carried out and post-war educational development is not to remain a mere myth, Union assistance and direction will be indispensable.

Once the powers and functions of the Union Government are decided upon, the question would necessarily arise as to how and on what basis these powers will be carried out and these responsibilities discharged. The United States have shown the way and the other federations have more or less conformed to the example of the American Commonwealth. This is to the effect that federal functions must be executed by federal agencies and must not be left to the agencies appointed by and responsible to the Governments of the units for such execution. This is an arrangement which, though logical and conducive to the interests of the Union, may not find favour in certain circles. People,

inured to the idea of local sovereignty, may regard this execution of federal laws and regulations through federal agencies as derogatory to the prestige of the federal units. Before 1935, pretensions to local sovereignty were noticeable only in the Indian States and their delegates alone raised in the Federal Structure Sub-Committee of the Round Table Conference the question of the agency for carrying out federal laws in their territories. They pointed out that the people of these territories would not care very much as to who made these laws but they would attach a good deal of importance as to who executed them. If they found that the officers who gave effect to them were officers of the State and were appointed by and responsible to the Prince's Government, the prestige and sovereign authority of the Prince would remain undiminished in the eyes of the State people. But if the latter found that the officers who were executing federal laws in the State territory were functionaries appointed by and responsible to the Federal Government and were not under the control of the local Prince's Government, they would certainly in that case entertain a different opinion of the Prince's position. So by way of maintaining the facade of State sovereignty these delegates insisted upon the agency being a State one.[20]

Accordingly, in Section 125 of the Government of India Act, 1935, it was provided that it would be open to the Ruler of a State, at the time of his accession to the federation, to enter into an agreement with the Governor-General to the effect that the agents to execute the federal laws in his territory would be appointed by and responsible to him. It was, however, laid down, at the same time, in this Section that it would be a duty of the Governor-General to satisfy himself, by inspection, that the officers appointed by the Ruler,

[20] There were many speeches advocating the agency being a State one. But that by Sir Prabhashankar Pattani made the demand clear and explicit. See Report. Vol. 1, pp. 111-14.

to this end, were fit and proper persons for the task to be allocated to them. Now, before 1935 the pretensions to sovereignty were confined only to the Indian States and that explains why this concession was made only in respect of a federated state and not in respect of a province. But since then these pretensions have been extended, on communal grounds, to some particular provincial areas as well, and it is not unlikely that such a demand will this time go forth not merely from the State-units but also from some of the provincial units. Any concession made to such demands will, however, be suicidal. In the light of experiences, particularly of the last few months, it will be singularly unwise to make the execution of federal laws, regulations and orders dependent upon the efficiency and loyalty of the provincial and State officers. If the Union is to grow, and even to survive, it must act directly upon the people of different units.

This takes us to the question of the maintenance of peace and order in the federal units. This may be one of the direct responsibilities of the Governments of these units.* But in case of a breakdown in law and order in any such unit, not merely the local interests but the interests of the Union as such may be adversely affected. The question will, then, necessarily arise as to whether the Union Government will be entitled to intervene and if so, to what extent. The lessons of the United States of America are unmistakable in this regard. Article 11 of the Constitution lays down that "the executive power shall be vested in a President of the United States of America" and this President has under

*In six Canadian Provinces police service is maintained by the Dominion Government. The Provincial Governments concerned have entered into an agreement with the Dominion Government regarding the contributions they have to pay. In the remaining provinces which maintain their own police force, the Dominion Government maintains a police establishment of its own for the enforcement of Dominion laws. See Wheare—Federal Government, p. 175.

the same Article to take the oath or affirmation—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." In other words, the President is authorised by the Constitution to take all steps necessary to remove the obstacles, which may at any time impede the working of the Constitution and which consequently may so impede the working of the federal functions, as laid down in that Constitution. Secondly, under Section 8, Article 1 of the Constitution, the Congress is empowered "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasion." Thirdly, Section 4 of Article IV provides "The United States shall guarantee to every State, in this Union, a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."

Sir Frederick Whyte, in summarising these powers of the Federal Government, observes that "the normal course of federal administration runs on a different plane from that of the States. It is only where the normal course is disturbed that the Federal Government may encroach upon the otherwise protected autonomy of the States. The President can only interfere with a State when it is his duty either to give effect to federal law or to exercise those discretionary executive functions which constitutionally belong to him (Articles II and IV of the Constitution). It is the President's duty to maintain the republican form of government, and if any State were to attempt to overthrow it, he is constitutionally bound to restore it. Equally, if a State were to attempt to resist the legitimate action of federal officers, in the course of their duty, the President must sustain his agents, if necessary by force of arms. Moreover,

constitutionally speaking, and apart from the question of negro slavery, the Civil War was the classic occasion of the use of the armed force of the Union to suppress an insurrection against the authority of the Federal Government."[21]

So, from the above, it is clear that in the United States, the Federal Government has adequate authority to secure the due enforcement of its laws and to suppress any insurrection against it. But the question may still arise whether, without invitation either from a State legislature or from a State executive, it can intervene to protect that State from domestic violence. We have seen above that the Constitution itself provides for such intervention only on State invitation. But domestic violence may not be a mere nuisance to the State itself. It may also interfere with the proper execution of federal functions. It may again gradually develop into an insurrection against the Federal Government. The requisite State authority may not for one reason or another hold out any invitation to the Federal Government for intervention. In such a contingency, what would happen? Would the Federal Government hold up its hands and look on helplessly while the situation may progressively go out of control? Not at all. We have a classic case of intervention not only without State invitation, but in the teeth of its opposition. In 1894, there was the railway strike in the State of Illinois. Violence was being threatened and even used against loyal workers. The question of protecting the rail roads, the free course of interstate commerce and the mails arose. The Illinois legislature was not in session and the Governor of the State did not ask for the interven-

[21] India, A Federation? p. 54. In the Dominion of Canada and Commonwealth of Australia it is laid down in their respective Constitution by way of emphasising the Central Government's responsibility in carrying out its own functions in an atmosphere of peace in all parts of the country that this Government is given power "to make laws for the peace, order or good government of Canada" in relation to.....

Cmmonwealth.

tion of federal troops. He even declared that as the forces he had at his disposal were sufficient, the National Government would be only encroaching upon the power of the State by intervention. But the Federal Government refused to be deterred by these niceties of constitutional provisions and sent troops to Chicago. Now by way of commenting upon this action of the United States Government, a well known constitutional historian[22] observes, "No one can seriously contend that the Government in the face of a serious insurrection, must wait placidly till a governor calls for aid, if the free course of interstate commerce and the mails be obstructed and the governor be negligent, unwilling or incompetent."

The framers of the Government of India Act,1935, had, it seems, similar ideas as to the power of the Federal Government. This Government was to see to it that federal responsibilities were discharged in the provinces without impediment and that the Provincial Government took due steps to prevent "any grave menace to the peace or tranquility of India or any part thereof". Section 126 of this Act deals with this subject and all its sub-sections should be taken and read together. "The executive authority of every province should be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose". Now what would happen if the directions issued by the Federal Government to a Province were not given effect to? The answer is given in sub-section (4) which reads: "If it appears to the Governor-General that

[22] A. C. McLaughlin.....Op. Cit, p. 767.
Powers given to the Federal Government in Switzerland in case of internal disturbances in any Canton are drastic. The Federal Government is entitled to appoint a federal agent to take charge of the situation and call in the military. See Robert C. Brooks—Government and Politics of Switzerland. pp. 55-57.

in any Province effect has not been given to any directions given under this section, the Governor-General, acting in his discretion, may issue as orders to the Governor of that Province either the directions previously given or those directions modified in such manner as the Governor-General thinks proper." In sub-section (5) it is further laid down: "Without prejudice to his powers under the last preceding sub-section, the Governor-General, acting in his discretion, may at any time issue orders to the Governor of a Province as to the manner in which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace or tranquility of India or any part thereof."

The insertion of sub-section (5), in this form, immediately after sub-section (4), was evidently intended to meet a situation in which there may not be any particular and specific interference with "the exercise of the executive authority of the Federation" but in which there may be such grave menace to peace or tranquility in the province as to make the exercise of federal executive authority difficult and full of danger. In other words, this Section of the Government of India Act was intended to provide that the Federal Government might not only compel the Provincial Government to obey its directions, in respect of the exercise of federal executive authority in the province, but might also compel the same Provincial Government to maintain peace and tranquility in the area within its jurisdiction so that in the absence of such peace or tranquility the execution of any federal function might not be impeded. It may, of course, be pointed out that the orders to be issued under sub-section (4) and (5) to the Provincial Government must emanate from the Governor-General acting in his discretion. In other words, the responsibility was not vested in the Federal Ministry but in the Governor-General himself. But the Governor-General, when acting in his discretion,

was still part of the Federal machinery. It was not because these powers were not intended for the Federal Government, but because the framers of the Act were distrustful of the popular Ministers and had far greater confidence in the Governor-General, that the powers embodied in sub-sections (4) and (5) of Section 126 were vested in the Governor-General to be exercised by him in his discretion. Now, in case the Governor-General divests himself of his discretionary powers, these powers must certainly be included thereby within the ambit of authority of the Federal Government. There cannot be any vacuum.

In view of what is stated above, the observations made in the Central Legislative Assembly by the former Railway Member, Mr. Asaf Ali, and the observations made in the British House of Commons by Mr. Arthur Henderson, the Under-Secretary of State for India, appear rather to be disconcerting. In reply to a question in the Central Assembly Mr. Asaf Ali pointed out that during the last few months there had been a large number of cases of passengers travelling by the B. A. Railway being molested, robbed and murdered and that there had not been any security of travel assured to the public in this line. In view of the fact that Railway police was a provincial subject, under the Government of India Act, the question was whether the Central Government was powerless altogether to take necessary steps in the execution of this important Central function. The reply of Mr. Asaf Ali gave out the impression that the working of his Department, in the provinces, was subject to the pleasure of the Governments of these units. This was certainly not what was intended by the framers of the 1935 Constitution Act. Nor, for the matter of that, would the framers of any federal constitution, worth the name, place the Departments of the Federal Government at the mercy of the provincial authorities.

Mr. Henderson, in his reply to a question in the House

of Commons, did not consider the problem of proper execution of federal functions in the provinces, when such execution was impeded in these areas. But he took up the wider question of law and order. Mr. Reid (L) asked for an assurance that the Government of India would not undertake bombing from the air in those areas where communal disorders occurred. Mr. Arthur Henderson, Under-Secretary of State for India, replying said: "As Pandit Nehru is reported as having recently reminded the Indian Legislature, the Government of India may not interfere under the existing constitution with provincial autonomy. Law and orded is a subject which is entirely within the field of provincial legislation and adminstration in India. If a Provincial Government were to ask the Government of India for assistance by bombing, the request could clearly be considered only in the light of circumstances which would obviously be most exceptional[23]". The evident implication of this observation is that law and order being a provincial subject, their maintenance is an exclusive provincial responsibility. The Central Government might interfere only on invitation by the Provincial authorities. This position is not only undesirable and even dangerous but inconsistent with law, as stated in a previous paragraph. It should be borne in mind that it is also inconsistent with the position now taken up in the United States of America. From the trend of the reply made by the Under-Secretary of State for India, and from the trend of policy now being followed in this country, it seems that the British Government is trying to create a convention, and to accustom the Indian people to that convention, that without any invitation from the Provincial Government, the Central Government would not be entitled to intervene either for preventing impediments to the execution of federal functions in the provinces or for the maintenance of peace and order in those areas.

[23] Statesman (Cal. Edition) 19.11.46.

If this policy is not reversed, and the Union Government now envisaged is not definitely empowered to take all necessary and proper steps for the execution of Union functions in the territories of the units, there will be no federalism worth the name in this country. If the Union Governmet is not given direct authority to make impossible, in the provinces, such circumstances as may interfere with the proper discharge of its responsibilities, the Union will be only a theoretical one and, for all practical purposes, provincial sovereignty will be securely established. So, even if the maintenance of law and order is made a provincial subject, there must be a provision in the Constitution empowering the Union Government to interfere when there is a break down in law and order in the provinces. The object of this interference should be not only to make easy and smooth the working of Union functions but also to protect the life and property of the minority communities. Recent experiences are so grim and poignant, in this regard, that some such provision in the Constitution appears to be urgent. It is not necessary in this chapter to discuss the problem of minorities in this country and to suggest constitutional remedies for the disease which is corroding the social and political life of the country. But, as the powers of the Union Government are here under consideration, it has been necessary to point out incidentally that this Government should have authority to interfere in the provinces so that there may not be any such breakdown in law and order as to jeopardise life and property of people belonging to minority communities.

It may now be stated by way of summarising what has been said in the above paragraphs that the Union Government should not only be empowered to exercise full, complete and exclusive jurisdiction over such functions as External Affairs, Defence and Communications but must have similar authority over Currency, Coinage and Legal Tender; Foreign Trade;

and Inter-provincial (Inter-State) Trade. The source of revenue for this Government should be unlimited. It should be stated again that the authority envisaged here for the Union Government is the minimum necessary to keep the Union together. But, with powers limited to the fields just enumerated, the Union Government will not be a very potent instrument of moral and material progress in the country. To that end it must have jurisdiction over functions further afield. It must have opportunity of fostering, directly or indirectly, the growth of education and culture and stimulating organisational efforts in respect of the production of food and the maintenance of sound health. It must be in a position, again, to provide for social security, which, as the experiences of other federations warn us, can be fostered only on a central basis. Lastly, as emphasised above, the Union Government must have adequate authority to discharge its obligations in all parts of the Union, irrespective of the attitude and policy of the Governments of the units.

CHAPTER IX.

GROUPING

Formation of groups among Provinces within the Indian Union is one of the important factors of the contitutional scheme recommended by the Cabinet Mission in its Statement of May 16, 1946. In sub-clause (3) of paragraph 15 of the Statement it is laid down that "all subjects other than the Union subjects and all residuary power should vest in the Provinces." Sub-clause (5) of the same paragraph provides that "Provinces should be free to form groups with executives and legislatures, and each group could determine the Provincial subjects to be taken in common." These provisions would have only one meaning to any one who may read them, e.g., that the Provinces would be the basic units of the Indian Union but if they thought necessary they would have the option to form groups for certain purposes. It should be emphasised that to enter or not to enter a group would be absolutely a matter of discretion of a Province. But later in the Statement the Cabinet Mission inserted provisions under which this voluntary character of grouping was undermined. While providing for the composition of the Constituent Assembly and laying down the procedure of its work in paragraph 19, the Cabinet Mission divided the Assembly into three sections A.B and C. In sectionA were included the provinces of Madras, Bombay, U. P.,Bihar, Central Provinces and Orissa, in section B the Punjab, North-West Frontier Province and Sind, in section C Bengal and Assam. In sub-clause (v) of this paragraph it is laid down that "these Sections shall proceed to settle the Provincial Constitution for the Provinces included in each Section and shall also decide

whether any Group Constitution shall be set up for those Provinces and, if so, with what provincial subjects the group should deal." In other words the constitution of a Province and its entry into a Group would be determined not by itself but jointly by all the Provinces included in a Section.

For instance in Section C which includes Bengal and Assam, the position of Assam in relation to the group will be determined not by itself in its discretion. What Constitution Assam should have, whether it will enter into a Group with Bengal or not, if it so enters what powers the Group will exercise in relation to Assam—these questions would be decided not by Assam alone but by Bengal and Assam together. So if the sixty members elected from Bengal would decide in favour of a particular Constitution for Assam and in favour of its entry into a Group with Bengal under certain conditions, Assam will be forced to accept this Constitution and this Grouping in spite of the fact that all its ten members might have opposed them. It will of course be open under sub-clause (viii) to the Legislature of Assam set up under the new Constitution to decide to come out of the Group. But it should be remembered that this new Constitution of Assam may have been so settled as to make impossible for the Legislature set up under it to opt out. Consequently these provisions of the procedural Section 19 were regarded in Congress circles as inconsistent with the substantive provisions of paragraph 15. Accordingly in the Resolution which the Congress Working Committee adopted on May 24, 1946, in respect of the Cabinet Mission Statement it was pointed out that "in the first instance, the respective Provinces shall make their choice whether or not to belong to the Section in which they are placed." The Cabinet Delegation, however, in a statement on May 25, 1946 pointed out that this interpretation "does not accord with the Delegation's intentions". It also pointed out that "the reasons for the Grouping of the Provinces are well-known and this is an

essential feature of the scheme and can only be modified by agreement betweeen the parties." So neither the Congress accepted the standpoint of the Cabinet Mission in respect of Grouping nor did the Cabinet Mission give up its point of view. The matter was left at that for the time being.

The Constituent Assembly which was to meet in August was not actually summoned before the 9th December, 1946. But when the date of its first meeting was so fixed it became clear that the Muslim League would not participate in its deliberations. In order that at a conference between the leaders of the British Government and the leading representatives of the Indian parties the still continuing differences might be ironed out the British Prime Minister invited Mr. Jinnah, Pandit Nehru and Sardar Baldev Singh to London where in the first week of December, 1946, fresh discussions were held. As still no agreement was forthcomming, the British Government issued a Statement on December 6 in which the Grouping clause was interpreted afresh. It was now pointed out that "the Cabinet Mission had throughout maintained the view that decisions of the Sections should, in the absence of an agreement to the contrary, be taken by a simple majority vote of the representatives in the Sections. This view has been accepted by the Muslim League, but the Congress have put forward a different view. They have asserted that the true meaning of the Statement read as a whole, is that the Provinces have the right to decide both as to Grouping and as to their own constitution. His Majesty's Government have had legal advice which, confirms that the Statement of May 16 means what the Cabinet Mission have always stated was their intention."[1] At the same time the British Government pointed out that "there has never been any prospect of success for the Constituent Assembly except upon the basis of the agreed procedure. Should the Constitution come to be framed by a Constituent Assembly in which a large section of the Indian population

had not been represented, His Majesty's Government could not, of course, contemplate as the Congress have stated they would not contemplate such a constitution upon any unwilling parts of the country."

Now what would be the meaning and significance of this last paragraph? It might mean that in the absence of the Muslim representatives from the Constituent Assembly any constitution it might frame would not be applied to those parts of the country in which they are in a majority. It would also mean that in case the representatives of any province were wholly or largely absent from the meetings of a Section any decision arrived at by that Section in respect of Grouping or Provincial Constitutions must not be forced upon that Province. So if, for instance the majority of the representatives of Assam kept away from meetings of Section C, any decision the Section might make regarding the constitution of the Province of Assam would not be binding on Assam. The Congress Working Committee adopted a lengthy Resolution at a meeting on December 22, 1946, on the Statement of the British Cabinet of December 9 which was regarded as going "beyond the original Statement, on the basis of which progress has been made till now." The Working Committee was still of opinion that the interpretation put by the British Government in regard to the method of voting in the Sections was not in conformity with provincial autonomy, which was one of the fundamentals of the scheme proposed in the Statement of May 16. But it was left to a meeting of the All India Congress Committee to accept or reject the British Government's interpretation of December 9. This meeting was held on the 5th and 6th of January, 1947 and in the Resolution adopted, the A.I.C.C. agreed "to advise action in accordance with the interpretation of the British Government in regard to the procedure to be followed in the Sections". "It must be clearly understood, however", continued the Resolution,

"that this must not involve any compulsion of a Province and that the rights of the Sikhs in the Punjab should not be jeopardised. In the event of any attempt at such compulsion a Province or part of a Province has the right to take such action as may be deemed necessary in order to give effect to the wishes of the people concerned." It may be pointed out that this was taking back with one hand what was given by the other. This last paragraph might appear to be inconsistent with the advice given by the A.I.C.C. to act according to the interpretation of the British Government regarding the procedure to be followed in the Sections. But this was quite in accord with the statement of December, 6 of the British Government as a whole, whose last paragraph is the counter part of this last paragraph of the A.I.C.C. Resolution.

One may naturally ask as to why this undue emphasis has been placed upon Grouping and why the British Cabinet has insisted so much on its compulsory character being maintained. It should be borne in mind that there is no option for one province to group with another of its own choice. For instance Bengal will not be entitled to group with Bihar or Orissa which are as good neighbours as Assam. Nor will the Punjab be allowed to group with U.P. even if it so intended. Bengal and Assam on the one side and Sind, North-West Fronter Province and the Punjab on the other are to be formed into Groups. It is significant that the Muslim League has for years demanded the combination and consolidation of these territories for its North-Western and Eastern Pakistan. The Cabinet Mission also pointed out in its Statement of May 25, 1946, that "the reasons for the grouping of the Provinces are well known." The reasons really were not to make the constitutional and governmental structure of the country scientific and easily workable but to concede in a concealed and underhand manner the substance of the Pakistan demand of the League.

In fact, it will be pointed out later, that as a unit of government the Group will be only an unnecessary and cumbersome addition to the constitutional mechanism of the country. Instead of helping, it may be actually retarding effective administration of Indian affairs. But it may be repeated, it was not as a contribution to the science of government but as a means of conciliating a political party in an unreasonable and unjustified demand that provision was made in the Cabinet Mission Scheme for Grouping.

It is interesting to study the ingenious efforts which have been made during the last twenty years to discover some kind of grouping as a result of which the Muslims might secure greater authority and power in India's constitutional organisation than what would be normally justified. In 1928 the Provincial Simon Committee of the Punjab recommended that for elections to the central legislature the existing provinces of India should be grouped into five units, each returning one hundred members to the Assembly and forty members to the Upper House. Otherwise the provinces as such would continue to be governmental units. Only for this specific purpose of electing members to the central legislature there should be these five Groups. Two years later in 1930, we have seen already, Sir Muhammad Iqbal in his address as the President of the Muslim League urged the establishment of a consolidated Indian Muslim State in the North West. As he did not eliminate the Central Government altogether but wanted this Muslim State to be fully autonomous subject to the exercise of certain functions by the Central Government, we might regard this consolidation also as a kind of Grouping of the existing administrative units in the North West. Again in 1939 when the Pakistan Resolution had not yet been passed but the path was being paved for it, Sir Sikander Hyat Khan, Premier of the Punjab, formulated a plan of grouping the existing provinces and states in India into

seven zones. The object was to weaken and reduce the central authority of the country and concentrate power in these zones, of which Assam and Bengal would be one and the Punjab, Sind, North-West Frontier Province, Kashmir, Punjab States, Baluchistan, Bikaner and Jaisalmer will be another. It is not necessary to enter into the implications of the plan.

It was after the Pakistan movement had been started by the Muslim League and different schemes were already propounded for the establishment of separate Muslim States in India that Sir Reginald Coupland came to this country to study its constitutional problem under the auspices of the Nuffield College, Oxford, of which he was a Fellow. Pakistan demand had not so far perturbed the Hindus. They knew that if it was not encouraged by the British for subserving their own interests it would peter out. The demand was so unjustified and so detrimental to the interets of all classes of people that it could not long last by its own strength. But Sir Reginald Coupland, Professor of Colonial History at Oxford, was favourably impressed by this Muslim demand. It should be remembered that he came to India to study its constitutional problem at a time too critical in the history of Britain. That was the winter of 1941-42, when the fortunes of the War were going so definitely against the allies. The attitude of the Indian National Congress towards the War, though fully intelligible to the Indian people, was dubious in the eyes of the British Government and people. Sir Reginald must have felt as the other Britishers usually did feel about the stand which the Congress took in respect of War. It should also be remembered that when Sir Stafford Cripps arrived in New Delhi in March, 1942, Sir Reginald was included in his mission and he must have been as bitterly chagrined as his chief became when the Congress could not be persuaded to accept his "post-dated" cheque. These factors together with his

ordinary political affiliations in Britain must have been responsible for so many one-sided views expressed by this trained and experienced historian in his lengthy treatise on India's Constitutional Problem divided into three parts. We are not concerned here with his unbalanced appreciation of India politics between 1935 and 1942. But in the third part of his book he inserted his own plan of the future governance of India. One aspect of it which he calls Regionalism[1] we have to consider as it bears so close a resemblance to the plan of grouping of the British Cabinet Mission.

The intention of Sir Reginald to formulate this scheme of Regionalism was obvious. He would not eliminate altogether the Central Government but would reduce it to an "agency" with only three functions. So in this regard he might not have gone the whole hog with the Muslim League which would do away with the Centre altogether but he tried to conciliate it as far as possible. Next he practically accepted the contention of the Muslim League that the North Western and North Eastern parts of India were Muslim Homelands and the Muslims should have opportunity of governing them in their own way. He, however, did not point out straight way that the province of the Punjab, North-West Frontier Province and Sind or the provinces of Bengal and Assam should be grouped together to serve this political purpose. He took shelter under the wings of what he described as "Economic Regionalism". Just as seven States of the American Commonwealth washed by the Tennessee River were brought together under the Tennessee Valley Authority, so also the Provinces and States washed and fed by the Indus in the North West and by the Brahmaputra in the North East should be brought together and grouped under one authority. It was unfortunate, he observed, that the existing administrative divisions of India

[1] Chapter X of The Future of India is on Regionalism and Chapter XI is on Agency Centre. Both are to be consulted in this regard.

did not correspond to any great extent with natural physical divisions. These divisions were the Indus basin, stretching from Kashmir to Karachi, the basin of the Ganges and the Jumna and the basin of the Ganges and the Brahmaputra. In the south he could not discover any river basin but South India was "the country of the Great Peninsula"

It is not necessary to enter into any discussion of the economic merits of this scheme of Regional division. We do not see, for instance, why Bengal should be included in the Brahmaputra basin and excluded from the basin of the Ganges. This Province must be equally interested in both the rivers. Then again it is not enough to refer to a big river and declare the Provinces through which it passes as being included in its basin. There might be other rivers, though not as well-known, which also might determine to a considerable extent the economic destiny of more than one Province. We may refer here to the river Damodar in which Bihar and Bengal are both interested and for the regulation of whose floods a joint authority has now been set up. So, while Bengal is associated with Assam through the Brahmaputra and the Meghna, it is associated with the upper Provinces through the Ganges and the Damodar. If for economic improvement it becomes necessary for Bengal to be closely associated with Assam, equally necessary it is for that Province to be associated with the areas upcountry.

The Tennessee Valley Authority which supplied the inspiration to Sir Reginald Coupland in this regard is not a political authority established in partial or complete supercession of existing political units. It is an extra-political organisation.[2] But Sir Reginald would make his Regions in India first and foremost political units, which would be strong and powerful. In fact they would replace the exist-

[2] See in this connection D. R. Gadgil—Federating India (1945), Chapter IX.

ing Central Government in their areas for many important functions. Actually these Regions were discovered by him to serve political objectives—to group together the areas demanded for Pakistan in the North West and the North East and grant them political power in supersession partly of the present Government of India and partly of the existing provinces. He only used an economic argument which might make his scheme more plausible in the eyes of non-Muslims. Unfortunately neither his digestion of the facts regarding the riverian economy of India nor his appreciation of the position of the Tennessee Valley Authority of the United States was as full and complete as one might expect from a man of his standing. Possibly such a digestion was not to be expected when the object was not so much to find a remedy for economic ills as to press an economic argument into political service. In any event a half-baked but all the same mischievous scheme was propounded by this Oxford professor. Much attention need not have been paid to the scheme but for the fact that from the moment of its publication it became popular in those circles which influenced British policy in India. It is significant that the scheme was explained in broadcasts from different stations of the All-India Radio which is a Government institution. It is not surprising, therefore, that this scheme of Professor Coupland was with modifications adopted by the British Cabinet Mission. What was a Region in the hands of Professor Coupland became a Group in the hands of the Cabinet Mission. The bluff of economic urgency for such a Group has not of course been repeated. This is an improvement not upon the scheme but upon its moral background.

With the introduction of a Group the Indian Federation will be a three-tier one and therefore far more complicated and cumbersome than an ordinary federation that history knows of. Any body who has an elementary acquaintance with the federal system will bear witness to the fact that it is very

difficult to work it without friction between the two governments operating side by side. If in India another story is added to the existing double-decker, that will only make the structure still more unwieldly and ramshackle. Nobody will be surprised if a constitution, so overloaded, reels and collapses after operation for a while. There will be friction between the Province and the Group and between the Group and the Union. As it has been pointed out already, linguistic Provinces have attained the dignity of a principle which cannot be violated in India today without generating a good deal of heat and friction. Not that linguistic Provinces are a great ideal. They in fact, if emphasised too much, may become a danger to our national intergity. But in a multilingual Province rivalry between different linguistic groups is so great and the risk of their constant opposition to each other in public affairs is so enormous that it is very likely that existing multi-lingual Provinces will also be reorganised in the near future on a mono-lingual basis. In view of this one could very well imagine how in a Group consisting of several linguistic elements constant friction and violent rivalry will characterise the conduct of public affairs. In the North West the Sindhi, the Pashto and the Punjabi elements may very well pull strings from different directions. In the North East the Assamese and the Bengalee elements are likely to have similar unhappy experiences.

Indian politics was, until it was complicated by the Pakistan ideal, influenced by two forces—nationalism and provincialism. These forces were no doubt cut across by religious communalism but as this communalism demanded accommodation both in national and in provincial spheres we may regard the forces as being mainly of national and provincial importance. Although, it is true, right equilibrium has not yet been found between the two, there has been some kind of an intelligible adjustment between the

two forces and people everywhere know on the whole what is due to the nation and what is due to the province. But if now an artificial unit is introduced in between the two, it will only bewilder and confuse the mind of the people. They cannot develop all on a sudden an attachment to the Group, which they may have for their province and their country. Consequently it is unlikely that they may unite in the same way in making the Group government a success as they happen as a rule to unite in making the national government and the governments of their linguistic provinces successful in their own spheres.

But though a Group Grovernment may work only with friction, still it may become a rival to the Union Government in a sense in which no Provincial Government can be a rival. In fact under certain circumstances which are not ruled out the Group Government may virtually reduce the Union Government to a shadow so much so that the Union may become a mere symbol without any influence on the working of our social and political life. It should be known that a government becomes powerful only to the extent of its command over the economic resources of the country. Even in an ordinary federation the balance of power between the federal government and the governments of the units does not remain as it is created by the fathers. It usually becomes increasingly weighted in favour of the centre or the units according as the former or the latter enjoys greater economic authority. Nobody can deny that the Federal Government at Washington has had opportunity of growing from Tocqueville's "one Department of Foreign Affairs" to Beard's "The Great Leviathan" only because of its increasing power to be economically useful.

Under the Government of India Act, 1935, there are as many as fifty-nine items included in the exclusive federal legislative list and there are thirty-six other items included in the concurrent legislative list. But under the Cabinet

Mission proposals only responsibilities in three fields were assigned to the Union Government. Even when all the implications of the responsibilities in three fields referred to by the Cabinet Mission are liberally brought out, the Union Government will still be a government of very limited jurisdiction, most of the remaining powers of the present Government of India being taken over by the Group Governments It is not unlikely that these latter may have their powers further enlarged at the expense of the Provinces. So the risk of the Group Governments being far too powerful will be always there and the more power they will exercise the more dangerous they will become to the integrity of the nation. So it need not be for a moment accepted that the Pakistan Frankénstein can be laid to rest by the concession of the Group.

Even if the Group is eliminated, as it should be eliminated, it will not mean that outside the Union powers the Provinces will have no opportunity of co-operation with one another when such co-operation may become necessary. Even in the United States of America there is provision for such co-operation between two or more states but with consent of the Congress.[3] It is by taking advantage of this constitutional provision that the States of New York, New Jersey and Delaware could enter into an agreement with one another in regard to the use of the river Delaware. Similarly the States of New York and New Jersey have under the same constitutional provision co-operated in managing the port of New York and in building the Holland Tunnel and Washington Bridge. Even outside this constitutional provision the neighbouring states would not unoften discuss affairs informally together and decide upon common measures to tackle similar problems. The Governors

[3] "No State shall, without the consent of the Congress.....enter into any agreement or compact with another State....." Article 1, Sec. 10, Clause 3 of the U.S. Constitution.

of the New England States for instance would meet from time to time for such discussion. Then in 1935 a new unofficial organisation called the Council of State Governments wan set up in the United States. Its object is to bring about by research and by conferences inter-state co-operation. If this body has opportunity of working according to its programme, it may help in doing away with many of the natural defects of the federal system.[4] So if Provinces which are intended to be grouped together in India have certain common problems outside the Union jurisdiction, there is no justification to think that they may not in the absence of a Group Government be solved on a basis of co-operation, formal or informal. In any event it will be wise to introduce a provision in the Union Constitution under which the Provinces having common or similar problems may approach the Union Legislature for passing an Act for tackling these problems on a common or uniform basis.

[4] N. C. Roy—The Federal System of the U.S.A: A Study in Federal—State Relations, Chapter XVII.

CHAPTER X

FUNDAMENTAL RIGHTS

Declaration of rights as a guarantee of individual liberty, is of British origin. The English people in their struggle against the expanding powers of the Crown insisted on such a declaration of individual rights which they would exercise and enjoy in their day to day life and which the King and his Government would not be entitled to violate. Magna Carta, the Petition of Rights and the Bill of Rights are the wellknown declarations of such individual rights of the English people. But as the struggle between the King and the Parliament ended in the decisive victory, and the establishment of full legal sovereignty, of the latter, the English Constitution ceased to include any such declaration of fundamental rights. It is of course customary to refer to the declarations mentioned above when any study of the British constitution is seriously undertaken. But the Constitution of England is as the Parliament makes or interprets it. Its authority is as supreme in respect of fundamental laws of the Constitution as it is in respect of the ordinary statutes. A declaration of rights is useless and worthless unless it can bind the legislature and executive of the country. But a declaration with such scope and authority would be inconsistent with the supremacy of the Parliament. Consequently, Britain is governed without the people having independent fundamental rights which the Parliament would not invade and the Executive would not violate. But this does not mean that in practice the British people live under a tyranny and their personal liberty is violated with impunity. Actually the tradition of English ad-

ministration continues to be influenced by the declarations of rights extorted in their days of struggle against the Crown. The old spirit of freedom still very largely influences the laws as they are passed by the Parliament from time to time.[1] The Habeas Corpus Act also continues to be the chief guardian of individual liberty. The British system is in fact a standing refutation of the contention that a constitution without an independent bill of rights cannot guarantee an adequate protection of individual liberty. But it should be repeated, the British Government has the advantage of being influenced by traditions of which other countries cannot boast.

While England has virtually eliminated a declaration of fundamental rights from its constitutional laws, and while the British Dominions except Eire have followed in the footsteps of the mother country, such a declaration has been an important factor of the Constitution of the United States of America and the Continental constitutions of Europe. It is significant that the United States Constitution as it was framed by the Philadelphia Convention, did not originally include any bill of rights. But when this document was submitted to the State Conventions for ratification there was an insistence on its inclusion in that document. Accordingly the first ten Amendments were forthwith adopted and they enshrined a declaration of individual rights which neither the Executive nor the Legislature would be entitled to violate. Subsequently the fourteenth Amendment adopted after the conclusion of the Civil War was added to the list. In Europe the outbreak of the Revolution in France was the signal for a new democratic constitution in that country. It was but in accord with the emphasis which

[1] The old rule of law which was the pride of the English people has of course been considerably modified during the last few decades by the growth of what was described by the late Lord Hewart as "New Despotism". But in a modern state with growing functions of government, this modification is inevitable.

had been placed in pre-Revolution days on the basic rights of the people that this constitution should incorporate a declaration of rights. The tradition thus created has been ever maintained in Europe. It was pathetic how the members of the Frankfort Parliament of 1848 devoted their precious hours to an elaborate and even protracted discussion of fundamental rights. They attached serious importance to the enumeration of such rights in the constitution they were called upon to frame and did not feel that they were really wasting much of their valuable time in such discussion.[2] Again the Weimar Constitution of Germany, adopted after the end of the first World War, contained possibly the longest list of fundamental rights. This was of course singularly appropriate in view of the prestige which democracy earned in Europe after its triumph over Prussian despotism. The tradition in fact has now been so set as to make a constitution an incomplete one in popular estimation unless it includes a declaration of rights. The content of such declaration may of course vary from country to country according to its peculiar circumstances and needs but the declaration is there in some shape or form. It cannot be said that the Constitution of the U. S. S. R. is democratic in the same sense as that of the United States of America or France. But it also includes a valuable chapter[3] on fundamental rights.

Both in the United States and in Europe the incorporation of a declaration of rights in the constitution was influenced and even dictated by the prevailing political philosophy. People enjoyed all rights when they were living under the law of nature. By compact they formed the state

[2] An eminent modern German historian (Veit Valentin in *The German People*) acclaims the statement of fundamental rights appended to the Frankfort constitution as "a magnificent introduction, a monument to German needs and German longing."

[3] Chapter X of the Constitution of 1936.

and handed over powers to a government. But while delegating powers to the government, they did not hand over all of them; they retained some in their own hands and under their own control. Consequently the government in exercising its powers must see to it that it was not encroaching upon the reserved field. It was these reserved powers which were to be incorporated in a declaration of rights so that the government might be careful to conduct its operations subject to the preservation of those rights. In other words the object of a declaration of rights was originally a negative and prohibitive one so far as the government was concerned. It was not to interfere in the exercise of this or that right of the individual. Even when a positive obligation was imposed upon a government, it was intended to safeguard individual liberty. Amendments VI and VII for instance imposed upon the U.S. Government the obligation of arranging trials according to a certain procedure. The object of a declaration of rights was really what these words meant—to protect rights. It was not intended to impose upon the government an obligation to advance any interest of the individuals by positive action. Fundamental rights were not to be declared, for instance, to promote education, provide work or undertake any other responsibility of this character. Those were days of a simple civilisation and fundamental rights were to be incorporated in a constitution to reduce governmental powers to a minimum and not to add to them by imposing new responsibilities upon the government. Secondly, as the object of declaration was to show that these rights were reserved in the hands of the individuals and were withdrawn from the sum total of power handed over to the government, the declaration had to be of a mandatory character so that the government might not have any discretion. One article of the American declaration of rights is cited here to show its unqualified and mandatory

character. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It may be repeated that when the above Article was formulated, the rights referred to therein were well understood. People knew how far to go and where to stop. Besides, population was compact and interests were not so divergent as they are to day in most countries. But at the present time freedom of speech, freedom of the press and freedom of peaceful assembly can hardly be guaranteed without qualifications to the citizens. An exercise of absolute right in any of these matters may not only handicap the executive in normal administration but in certain circumstances may help in overturning the government and engulfing the state itself. In Czechoslovakia before the second World War the Government was democratic and allowed an excercise of the right of free speech etc to the citizens. But we all know how the Sudetan Germans found it possible to organise themselves into a disruptive force under cover of these democratic rights. The lesson is that absolute right in respect of the enjoyment of these privileges cannot be conceded to its citizens by a modern democratic state without detriment to its basic interests. We all know again how the friends of the Nazis in the United States took advantage of the basic rights of the people there in organising the German-American Bund and making it the spearhead of a Nazi attack on American institutions. For sometime it was a real nuisance and seriously endangered American social and economic life. That is why fundamental rights are incorporated to day in different modern constitutions in such a manner as to enable the government to suspend their application in certain circumstances. In the Irish Free State Constitution of 1922 for instance, Article 7

provides: "The dwelling of each citizen is inviolable and shall not be forcibly entered *except in accordance with law.*" (Italics are mine) Again Article 9 lays down that "the right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed *for purposes not opposed to public morality.*" (Italics are mine) This conditional exercise of a fundamental right certainly makes it worthless on crucial occasions. The government in its discretion may very well interfere with it whenever it deems such interference necessary and proper. But this cannot be helped. Modern conditions make a mandatory right undesirable and dangerous.

Then again in some constitutions *e.g.* the Weimar Constitution of Germany and the Soviet Constitution of 1936, some fundamental rights accorded to the people happen to impose a great positive responsibility upon the government. The Weimar Constitution for instance placed upon the government the obligation of providing education till the eighteenth year and also of providing work to all people. Under the Soviet Constitution also the citizens of the U.S.S.R. have not only the right to work but also the right to rest which was to be "ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers, establishment of annual vacations with pay for workers and employees, and provision of a wide network of sanatoriums, rest homes and clubs for the accommodation of the toilers."[4] The Citizens of U.S.S.R. were again given the right to education, which was to be "ensured by universal, compulsory elementary education, education free of charge—including higher education—by the system of state stipends for the overwhelming majority of students in higher Schools...."[5] Anyone reading these Articles will be at

[4] Article 119.
[5] Article 121.

once convinced that they could not be intended to be of mandatory application in the case of every individual citizen. Rest for instance could be provided only in the discretion of the authorities. In fact the language of the Articles was itself an indication that the government was to discharge these obligations as best it could. This, however, does not mean that qualified fundamental rights regarding liberty of speech, assembly etc. and non-madatory fundamental rights which throw positive obligations on the government regarding the provision of work. education, rest etc. are not of much value and are intended only to enhance the picturesque character of the constitution. Really they have positive value in this that they hold aloft an ideal which the government should try to reach. Even when the inviolability of the dwelling is guaranteed to a citizen as only a conditional right there is every likelihood of the government respecting this inviolability except under great provocation and dire necessity. Similarly although to provide rest may not be a mandatory obligation of the government in every individual case, the incorporation of this individual right in the constitution means the fixing of a target which the government must aim to hit. In fact incorporation of fundamental rights in the constitution in this form has this advantage that it may help in gradually reaching an ideal without putting an undue strain upon the judiciary of the country.

In the United States fundamental rights being categoric and mandatory, it is the obligation of the courts of law to see to it that these rights are respected. Unfortunately cases arising out of the operation of such rights involve social issues of a highly controversial character and the judges being human beings cannot divest their minds of predilections on this or that side. Consequently differences of opinion among the judges often become marked and the majority decision need not necessarily be the most

appropriate one. Very often again decisions in parallel cases become different and that is explained by a change in the composition of the court. All this may create uncertainty and confusion as to what governmental action may be inconsistent with the basic rights of the people. In view of this it was not unreasonable of a distinguished historian to observe: "From a longer perspective it may be doubted that judicial intervention has served a useful purpose".[6] He pins his faith to the Jeffersonian specific of an educated and alert public opinion for the proper enforcement of fundamental rights. If these be the opinion in respect of these mandatory rights, the distinction between them and the qualified and non-mandatory rights referred to above becomes thin. There is no doubt about it that the latter may serve their purpose best when public opinion of a country is worked up in favour of reaching the ideal which they set forth.

The Cabinet Mission provided in Clause (IV) of Paragraph 19 of its Statement of May 16, 1946, for "an Advisory Committee on the rights of citizens, minorities, and tribal and excluded areas" to be set up by the Constituent Assembly. In para 20 it was further laid down that this Committee "should contain full representation of the enterests affected. and their function will be to report to the Union Constituent Assembly upon the list of fundamental rights, the clauses for the protection of minorities, and a scheme for the administration of tribal and excluded areas, and to advise whether these rights should be incorporated in the Provincial, Group or Union Constitution". The Constituent Assembly in its second session in January actually constituted this Advisory Committee which in its turn met for the first time towards the close of February. It then elected Sardar Vallabhai Patel as its Chairman and divided itself into three sub-committees.

[6] Henry Steele Commager—Majority Rule and Minority Rights (1943) p 81.

One of them is intended to formulate fundamental rights, another to make provisions for the due protection of the interests of the minorities and the third to formulate a scheme of administration for the excluded and partially excluded areas.

For the last hundred years India's intelligentsia has been fed on English democratic thought. The freedom movement which was started by this class and has been conducted under its leadership ever since has been largely influenced by the British ideal and practice of personal liberty. In fact it has uniformly held aloft this ideal and protested with all the emphasis at its command whenever the British Government violated this ideal either in its executive action or in its legislative policy. We all know of the widespread opposition which was invariably roused by the application of the Bengal Regulation III of 1818 to particular cases from time to time. We all know again of the great handicap under which the Indian press had to thread its way to a position of influence and power. Limitations which were put upon its freedom from time to time had hardly any popular approval. In view of these facts many expect the Advisory Committee referred to above to formulate fundamental rights in respect of these matters, which neither the legislature nor the executive would be entitled to violate in any circumstances. But the Advisory Committee consists of men of great political experience. Many of them have inside knowledge of the working of the Government and responsibilities which it has to discharge. They will have full appreciation of power and authority which the Government will require in performing its elementary duties in moments of difficulty which are unfortunately not infrequent in this country. It is not expected on this account that the Committee will help in incorporating in the Constitution fundamental rights of a mandatory and unqualified character. We should not be surprised if it recommends the rights of free expression,

free association and combination, inviolability of person and dwelling property etc.,to be declared in the Constitution as an ideal which the executive and the legislature would be required to keep always in view and never to deviate from without assigning proper reasons for such deviation.

Similarly there should be provsions for freedom of belief and conscience and freedom of profession and practice of religion for all citizens. The fundamental rights to be formulated in this regard cannot necessarily be of an unqualified character. Practices of religion may not unoften be inconsistent with public order and morality. These fundamental rights may, therefore, be introduced in the Constitution as an instruction to the legislature and the executive to uphold them in their spirit as circumstances permitted. Abduction and molestation of women have been frequent occurrences in India and the recent happenings in Tippera, Noakhali, Bihar and other places have brought them further into prominence. In view of this it is not surprising that associations of women and individual women social workers in many places have urged the incorporation in the Constitution of some fundamental right under which women in this country may enjoy in the future some kind of immunity from these crimes. They want the sacredness of woman's person to be declared in some form or another so that any person violating that sacredness may be punished by death or some sentence of equally deterrent nature. Evidently the Advisory Committee is expected to declare the sacredness of woman's person as a fundamental right. It will be, however, for the legislatures to implement it by a suitable amendment of the existing laws on the subject. Equality between men and women may also be formally declared in the Constitution. But this may also be treated as an ideal which the legislature and the executive will try to implement as far as and wherever circumstances

may permit. It is obvious that in all conditions such equality cannot be maintained.

The last twenty-five years of Indian history are marked by the rise as much of communalism as by provincialism. When a man emigrates from one province to another, he is now confronted with many disabilities. Unless in due course he is declared domiciled in one form or another, he cannot get employment under the provincial Government or generally under any institution aided by the Government. He may not even secure admission to a college. Licences for purposes of trade, where necessary, may not also be given to him. His position is in fact practically of one who has migrated from one independent state to another. This is a condition of things hardly consistent with India being one state or one nation. Federalism does not imply the growth of such rigid localism. In fact such localism will only end in destroying federalism and establishing provincial independence. The Advisory Committee and the Constituent Assembly will be wise in making some provision in the Constitution for arresting this growth of provincialism. To this end it will be appropriate to concede a fundamental right to an Indian citizen of whatever provincial affiliation to move throughout the Indian Union and stay and settle in any part thereof, to acquire property, to follow any trade or calling and to be treated equally in regard to facilities for education, public employment and legal protection in all parts of the Union. The fundamental right may of course be still better ensured if every citizen of the Indian Union could acquire the right of a citizen in any province or federated state by virtue of his residence there. The XIV Amendment of the United States Constitution lays down: "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". If this provision is incorporated in our Constitution, it would eliminate many ills from which

we suffer to-day. It will be of a mandatory character and consequently no discrimination of any kind, temporary or permanent, against any person coming from another province will be possible on the part of the authorities of any province or federated state. But if provincial Governments are given the right, as they have to-day, of insisting on domicile, in that case at least the declaration of fundamental rights should have a clear reference to the matter.

CHAPTER XI

PROTECTION OF MINORITIES

India is a diversified mosaic. It contains various groups of people with different racial, linguistic and religious affiliations. Within the fold of Hinduism again there are the scheduled castes which have grievances of their own against the people of other castes and do not think that their rights and privileges as citizens of the country have been adequately safeguarded. In fact, India being a multi-communal or, if some may prefer it, a multi-national state, it is essential that the constitution should make ample provision for the protection of the interests of the different communities or nations, particularly of those which are in a numerical minority. In writing of the racial minorities of Europe and their interests, Lord Dickinson observed more than fifteen years ago: "It was essential that the minorities should be assured of those rights which all nations hold dear—the right to speak their own language; to observe their own forms of worship; to maintain their national traditions, their literature, their customs; to bring up their children in the ways of their ancestors; in short, to retain their racial individuality notwithstanding their incorporation in the realm of a foreign people".[1] This observation does not apply in every sense to the problem of minorities in India. None of them for instance are in the realm of a foreign people, although their religion, manners and customs and in some instances even language may differ from those of their neighbours. Again in respect of the depressed classes or scheduled castes the

[1] See Foreword to Minorities (a publication of the British League of Nations Union, 1930).

question of maintaining "their national traditions, their literature, their customs" does not arise. They have no separate literature of their own to protect and encourage. Traditions and customs which they have are also not to be stereotyped. On the contrary protection of their legitimate interests would involve a change in those traditions and improvement on those customs. Their children also are not to be brought up in the ways of their ancestors but are to be introduced to new progressive ways of life. With these exceptions the observation applies to India's minorities—the Parsees, the Sikhs, the Indian Christians, the Hindus in Muslim majority provinces, and the Muslims in the Indian Union and the Hindu majority provinces. But it does not go far enough. After the first World War the Principal Allied and Associated Powers entered into treaties with several new states which were being set up and in these treaties there were provisions for the protection of racial minorities. The protection intended was in respect of their language, religion and cultural tradition. This is explained in the observation quoted above. But in India the scope of minority protection is far wider and includes adequate representation in different branches of government. When the minority rights are enumerated, they must therefore not only refer to the linguistic, religious and cultural interests of the minorities but they must involve a reference to their political status. This makes the Indian problem more complex.

None will deny that there are racial, linguistic and religious minorities in several countries where, however, there is no elaborate arrangement for the protection of their racial, religious, linguistic and political interests. In the United Kingdom, for instance, there is a religious minority of the Roman Catholics and the Dissenters and there are the racial and linguistic minorities of the Welsh and the Scotch. But there has been no insistence so for for the protection of their separate identity and special way of life. While again

the Roman Catholics were given the vote in the last century no seats are reserved for them in the House of Commons, the Cabinet or the Services. Scotland and Wales have their own constituencies. But they may be contested by non-Welsh and non- Scotch candidates. In fact all talks about minority representation in the legislature have so far been connected in Britain with the object of securing such representation for minority political interests only. The idea behind the speculation of John Stuart Mill and his successors on the representation of minorities was to secure representation in the House of Commons for different political ideas and programmes in proportion to the numerical strength behind them. This ignoring of religions, racial and linguistic minorities was due to their satisfactory adjustment to the general national life. They actually indentified themselves with it and did not regard any facilities for due protection of their separate interests necessary.

The United States are certainly a multi-national and a multi-religious country. But there are only a few constitutional provisions for the protection of the racial, religious and linguistic interests of the different minority elements. We are excluding from consideration the Red Indian population. Even then there are the Negroes from Africa, the Japanese and the Chinese from the Far East, a large body of Italians, and other South Europeans in the country to make the racial texture of the population so diversified. There are more than twenty million Roman Catholics to illustrate religions diversity. As for languages, all groups of immigrants bring with them a language of their own to strengthen the linguistic diversity which the old German and French settlers introduced in the country long before the nation started on its career. Now what are the constitutional provisions to guarantee the protection of the religious, linguistic, racial and political interests of these different minority groups? The only provisions are those included in the

original constitutional amendments which embody the declaration of rights and in amendments XIV and XV. It is laid down in these Articles that no law shall be passed by way of establishing a religion or prohibiting its free exercise or abridging the freedom of speech, or of the press, or the right of the people to assemble peacefully. All persons born or naturalised in the United states and subject to the jurisdistion thereof are citizens of the United States and of the state wherein they reside. No state shall deprive any person of life, liberty and property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws. The right of any citizen of the United States to vote shall not be denied or abridged on the ground of race, colour or previous condition of servitude.

The question is if these few constitutional provisions, most of them of so general a character, have ensured adequate protection of minority interests. This can be answered only in the light of the basic policy pursued in the United States in respect of minorities. This policy has been directed, except in one or two instances, towards a complete assimilation of diverse elements into the Anglo-Saxon system. Through Schools, Universities, Clubs, Churches, Press, and Platform of every description one object is relentlessly pursued—that of Americanising every element that enters into the States. In other words the policy is not, in respect of different racial and linguistic groups, to maintain their separate identity but to eliminate them as separatist factors by assimilating them all. In view of this the question of protecting different linguistic and racial interests does not arise. Roman Catholicism has not of course been encouraged but it has stood the ground all the same and today one-sixth of the total population cherishes the Roman Catholic faith and leads a Catholic way of life. To this extent nationalisation and Americanisation is not complete. It is therefore pertinent to ask as to how the Roman Catholic interests are safe-

guarded. They are safeguarded not by positive intervention of the State but by the policy of *laissez faire*. The Roman Catholics have their own Churches and what is more in many place their own Schools, Colleges and Universities in which Roman Catholic students get their education in Roman Catholic environments. In the field of politics and administration they have certainly no separate electorate and no separate seats or posts reserved for them. They take their chances along with others, although the Roman Catholic faith is not unoften a handicap. In spite of it of course they have found their way to offices of dignity and responsibility. But so far the White House has been practically barred against them. Since 1789 no Roman Catholic has been elected President of the United States. There is another important element which has not been assimilated. In fact in respect of the Negroes the policy is not to throw them into the melting pot, but to keep them as they are, distinct and separate from the rest of the population. They are one-tenth of the population and consequently a large body. They have in practice no equality before law. The full protection of their citizenship rights which was guaranteed to them by XIV and XV Amendments has not been forthcoming in practice.[2] They have no equality of opportunity and are treated as a body of people with only inferior rights. As Americanisation has stopped short of the Negroes, they may very well ask for some constitutional arrangement under which they may stand full height as men. But it has yet to come forth.

In the Dominion of Canada the policy of the Government is the same towards linguistic and racial minorities with one well-known exception. In fact barring this exception the policy is one of unified nationalism. Immigrants of

[2] Inequality of treatment from which the Negro population suffers has been discussed in several able publications. One of them is Black Metropolis by H. R. Clayton and S. C. Drake. In respect of the Japanese in the U.S.A. also, treatment has been discriminatory in many instances.

such racial stock as it may be difficult to assimilate are rigidly kept out. But in respect of the immigrants from Europe who come with different racial and linguistic backgrounds, the policy is to see that they do not hold on to the customs and traditions to which they are born and to assimilate them to the predominant Anglo-Saxon Canadian stock. On this account the question of protecting minority interests does not arise. We have, however, already met with one exception to this rule and that is represented by the Roman Catholic French-speaking population of Quebec. The nucleus of this French population was there when Canada was a French colony. Since its transfer to Britain this group has multiplied many times but it clings with persistence to its Church and to its language as they had been introduced in the province with the first entry of French peasants into Canada three hundred years ago.

These French-speaking people are not only numerous in number but, as it has been just pointed out, very tenacious in regard to their religion, language and traditions. Consequently they would not give up their own way of life and go the way of the Anglo-Saxon people in the country. They again would not be satisfied merely with the protection of their religion, language and peculiar customs but must have adequate political voice in the ordering of their life in the country. Accordingly after much wrangling and considerable friction, Canadian provinces were federated into a Dominion. In this federation the territory in which this French element so largely predominates was made a separate province under the name of Quebec. This was done with the obvious purpose of giving the French speaking people an opportunity of dealing with their local affairs in their own way. Then in order that in the affairs of the Dominion also the French-speaking people might have substantial voice it was laid down in Section 37 of the British North America Act that the Province of Quebec would have 65 representa-

tives in the House of Commons and in Section 51 it was further laid down that this number would be fixed and that other provinces would have representation which would bear the same proportion to their population as 65 bore to the population of Quebec. In regard to their education under Roman Catholic environments adequate protection was ensured to them by Section 93 of the Act, under which, though education was a provincial subject, the Dominion Government was specifically empowered to intervene for such protection. In regard to their French language also Section 133 povides for its adequate safeguard. In fact for purposes of debates in the Dominion and the Quebec legislatures and for the proceedings of the courts of law bilingualism was introduced, French having the same status as English. Today as a result of the enjoyment of autonomy in respect of their provincial affairs and as the result of their adequate voice in the Dominion legislature the French element has opportunity of maintaining its separate identity in every way it desires. People who advocate complete separation of those areas in India in which the Muslims are in a majority so that this Muslim population may have full and unfettered opportunity of maintaining their way of life, should profit by the experiences of the French-speaking Canadians of Quebec. This province is a mere unit in a federation of which the Central Government is in no way a weak and effete institution but a strong and powerful body. But all the same the French element has found it easy to maintain its distinctive civilisation with such completeness that many of the French themselves are not sure if it would not have been better for them to give up a portion of their distinctiveness and to acquire to a greater degree ideas and habits which were not their own.

Reference has been made to racial and linguistic minorities in several states which were created after the first World War in Europe. The boundaries of these states could

not be so drawn as to exclude these minorities. But in order that their interests might be properly safeguarded, these states had to enter into treaties with the Principal Allied and Associated Powers. The obligation of protecting the minority interests in these states was not, however, undertaken by these Great Powers themselves but was shifted on to the League of Nations which was to exercise supervision in such a manner as to ensure due protection of the racial, linguistic and religious interests of the minorities in these Treaty states.* The idea of vesting this responsibility in the League of Nations was inspired by the conviction that "It is impossible to rely upon the Governments concerned to assure to the minorities in their States the full meed of tolerance to which they are entitled". While this conviction was not wholly wrong, it was also too optimistic to think that it would be possible for a body external to a state to exercise supervision in such manner as to ensure protection of their interests to the minorities. To the Government of a state such supervision and interference would be always unwelcome. Actually the League of Nations could not enforce these minority treaties effectively and after a time they virtually became a dead letter. In fact it is not likely that any foreign authority (the United Nations Organisation or the Government of another state) can ensure due protection of their interests to the minorities in any country without jeopardising its national independence. For a foreign power to exercise proper supervision in this regard it is essential that it may interfere in and veto Government action even in day to day affairs. So the suggestion that a solution of India's minority problems should be attempted under the auspices of some international authority is untenable.

Many will no doubt desire to profit by the experiences of the U.S.S.R. in respect of the minority problem. It has

*On this subject see D. N. Sen—The Problem Of Minorities. Chapters III—VI.

been pointed out already in a previous chapter that there are innumerable racial and linguistic elements in that country, some large, some small and some insignificant. Except in the case of those which are too insignificant, it has been the policy of the Soviet Government not only to ensure protection of their racial, linguistic and cultural interests but to encourage their growth and development by positive action. Not only for instance the popular old festivals of many of these minorities are now particularly emphasised and encouraged but their language which might have been a mere rudimentary one is being developed in every way possible. It is being used as the medium of instruction in schools and medium of record in the Government offices and courts. But while all efforts have been made to stimulate the peculiar cultural and linguistic traditions of the minorities, there is no gainsaying the fact that the U.S.S.R. is a far more unified country today than it had been at any time before. This is due to the common communist civilisation which has been fostered in so sedulous a manner and on so uniform a basis throughout the Union by the Communist Party and other Government agencies. So by way of protecting and encouraging minority interests, their separate outward forms may have been stimulated but the way of life and the spirit of civilisation throughout the Union are now the same. In outlook, in ideal and in approach the people everywhere in the U.S.S.R. have attained or are attaining rapidly a common standard. This uniformity has been reinforced by the compulsory use of Russian as an alternative language since 1938 and by intermarriages which are now so common. In view of this one should not be surprised if after a few more years the U.S.S.R. presents the same spectacle of unity as the United States does today in respect of white population. So the Siviet example can be of help to us only in this that it may reinforce our conviction that all racial and linguistic minorities, unless they are too insignificant, should have

opportunity of growing and developing. But the machinery used for this purpose in the Soviet Union is peculiarly Soviet in character and it may be difficult to improvise it here in this country.

While other minorities in India must be given due attention and have their interests duly safeguarded by appropriate provisions in the Constitution, it should be borne in mind that the existing relationship between the Muslims and the Hindus is mainly responsible for the acuteness of the minority problem in India. It is necessary on this account to pay our first attention to the Hindu-Muslim question. It should be seen whether any lesson may be drawn in this regard from the experiences of other countries referred to above. It seems that we may draw liberally and profitably upon the experiences of Canada, not for solving but for relieving the acuteness of the Hindu-Muslim problem. In the United Province of Canada the French and the English settlers quarrelled bitterly with each other for more than twenty-five years. The feuds between them were as unfortunate as those between the Hindus and the Muslims to day. The Canadians found a solution of this problem by partitioning the province into two separate halves and then making both autonomous units of a larger federation. In Bengal and the Punjab the relations between the Muslims on the one side and the Hindus and Sikhs on the other have taken so serious a turn chiefly because the numerical strength of the two is nearly equal and on that account predominant inflence of no one community can be tolerated in the public affairs of these provinces. In Bengal for the last ten years 44% of the total population has been placed under an absolute control of the *brute* majority of the Muslims. This is a position which has naturally become intolerable from every standpoint to the Hindus. Tension so brought about can be relieved and acuteness of the Hindu-Muslim problem can be reduced only by doing in Bengal and the Punjab what was done in Canada in 1867.

It is fortunate that in one part of both Bengal and the Punjab the Muslims are in an overwhelming majority while in the other part the Hindus (or Hindus and Sikhs together in the Punjab) are in such a majority. Consequently geographical division of either province is possible and practicable.

A small minority like the Hindus in the North-Western Frontier Province or Muslims in Orissa or Madras does not and cannot object to the Government being dominated overwhelmingly by the majority community provided its religious and cultural interests are not violated and provided it has its proportionate share of participation in public administration. Similar will be the attitude of the Hindus in Eastern Bengal and of Muslims in Western Bengal or of Hindus and Sikhs in Western Punjab and of Muslims in the Eastern half of that Province. Even after division the provinces involved will remain far larger in numerical strength than several existing Provinces in the country. Their economic and financial resources will also be correspondingly large. In view of this there should be no difficulty in bringing about the partition. It is pointed out on a rather insufficient ground that it would violate the principle of linguistic provinces. There is nothing in this argument. Eastern and Western Bengal or Western and Eastern Punjab will remain as good linguistic units as Bihar and U.P. are to-day. It may not be wise in the peculiar circumstances of India to make a Province a multi-lingual one. But there is no sense in thrusting all the people speaking one language into the bosom of one Province, although thereby that province may be unwieldy as Bengal already is or although thereby other differences between one group of people and another may be so accentuated as to throw into the background even the linguistic bond. It has also been pointed out that there is danger in partitioning a Province on the basis of religion. But when inside one province there can be nothing but recrimination between two ways of life and when one of them stands the risk of being smothered

by the other it is but commonsense that the Province should be bifurcated so that both ways of life may have opportunity of development and fruition. So either the British Government should undertake under the Government of India Act, 1935, a partition of these Provinces or if the British Government for some inexplicable reason refrains from the step, a provision should be somehow incorporated in the new Constitution enabling a given number of people residing in a particular region of a Province to demand its separation and formation into a new Province. In that case the Union Government should be empowered to give effect to this demand after following a given procedure.

As stated already, this partition of the two Provinces which contain more than half of the total Muslim population in India will relieve the acuteness of Hindu-Muslim problem. But it would not amount to a full solution of the problem for there will be still Hindu minorities in Muslim Provinces and Muslim minorities in Hindu Provinces. Adequate provision must be made in the Constitution for the protection of the interests of these minorities as also for safeguarding similar interests of other minorities like the Indian Christians and Parsees. First of all the Constitution should define a minority, such difinition being itself a safeguard of minority interests. Article 93 of the Treaty of Versailles defines a minority as "inhabitants of a state who differ from the majority of the population in race, language or religion." It will be unwise in India to define minorities on an All-India basis. What affects the day-to-day life of an individual or a community will be mostly dealt with by Provincial Government. In view of this if people who are in a majority in the whole country but are in a minority in a Province are not given minority privileges in that Province, their position there may be difficult and precarious. So it is pertinent that a minority may be defined as inhabitants of a Province who differ from the majority of the population in that Province

in race, language or religion. This definition will not, however, cover the scheduled castes. But a provso may be added in regard to their position.

Articles should be inserted in the Constitution so as to place under protection profession or practice of a religion, use of a language, personal law etc. for any minority. Its system of education should also be particularly safeguarded so that by controlling its education the majority may not undermine its cultural life. To this end again Canada is an example. In the province of Quebec the Board of Education has two wings—(i) A Protestant and British wing (ii) A Catholic and French wing. While the whole Board meets for particular purposes, the actual control of schools is vested in the separate wings. In that way the French have their schools according to their own ideals and the English Canadians in the Province have their schools as they like them to be. In Indian Provinces, if necessary, separate Boards of Education and separate Universities may have to be set up. To this end the Constitution should provide that as a mandatory safeguard of its interests any minority may demand and secure the establishment of a separate education authority for its benefit. In that case the Government shall provide financial aid to this authority—aid which shall bear the same proportion to total Government expenditure under this head as the portion of the numerical strength of the minority to the total population of the province. In regard to political rights the minorities should be given representation in proportion to the population.

In regard to the scheduled castes we have seen already in a previous chapter that their problem is different from that of religious minorities. They should have minority rights not for safeguarding their existing position but for improving it and making them equal to the caste hindus. To this end separate representation, though of a modified form, has been helpful to them in augmenting their status both politically

and socially. But it should be the function of the Constituent Assembly to provide in the future Constitution of India a system of representation for the depressed classes, which would be so elastic as to exclude automatically from its benefit any existing scheduled caste which has already attained a standard of improvement in education etc. A caste so withdrawn from the schedule will of course be placed thenceforward in the general group. Two purposes will be served by this arrangement. First, it will stand in the way of the existing division between scheduled and non-scheduled castes being stereotyped. Secondly, it will make impossible for a scheduled caste which has already attained considerable economic strength, political power and social prestige to appropriate to itself the greater portion of the good things of life and thereby stand in the way of other scheduled castes getting a due opportunity of improvement.

It is not necessary to go further into details as to the kind of protection which the minorities happen to demand for their different interests. These details are well known and have been discussed off and on in the country and require no reiteration. But there is one question on which some observations here are necessary. It is pertinent to ask, who will supervise the enforcement of those clauses of the Constitution which will provide for the protection of different minority interests. We have seen above that after the first World War the Principal Allied and Associated Powers took it for granted that the Government of a state could not be depended upon for the due enforcement of the provisions of the treaty into which it would enter for minority protection. Accordingly they entrusted the responsibility of supervision to the League of Nations. In India also it need not be assumed that the Government concerned, when left to itself, will be quite in a position to enforce its constitutional obligations to the minorities. Its composition and still more the composition of the majority in the legislature upon which

it will be dependent are important factors in this regard and they being uncertain, some other procedure of supervising the enforcement of minority rights should be devised.

It may be pointed out, of course, that the courts of law will be there and they may be resorted to with effect. They will certainly be an important guardian of minority rights as also of other rights arising out of the constitution and laws. But they cannot be the sole guardian. First, many of the rights conferred upon the minorities may not be justiciable at all and therefore in respect of their position the courts will be helpless. Secondly, the composition of the courts is an uncertain factor. Even in countries in which the bench is independent, by law and tradition, of the executive and the legislature, the courts may not always take a strictly independent and impartial view of a case involving some social controversy. Here, in this country, most men are today infected with some kind of communal virus. It is too good to believe that judges of courts will be an exception to this rule and take always an impartial view of things. Rather the contrary may be expected. In view of this some alternative machinery of supervision should be set up. The Sapru Cimmittee[3] has recommended the establishment of minority commissions both in the provinces and in the Centre to this end. The scheme has its defects. These commissions may, for instance, try to meddle too much and regard themselves as a super-legislature and a super-executive. But the merits of the scheme outweigh its defects and, therefore, it may be tried. Only this should be emphasised that as the commission will be only advisory and as on that account its recommendation may be turned down by the Provincial Government, it is necessary that the ultimate responsibility of enforcing the minority rights should be vested in the Union Government. An appeal in other words will lie with this

[3] Report pp. 259—263.

latter Government and in disposing of it this Government will be guided by the advice of the Union Minorities Commission.

Since the above was written the decision to partition the country has been taken. In one part, the Muslims will be in a majority and Hindus and Sikhs will be the important minority. In the other the position will be the reverse. So the two parts should arrange for the protection of minorities on the basis of equal concessions.

CHAPTER XII

FORM OF EXECUTIVE

There is naturally a speculation in the country as to the form of executive which we should have in the future both in the Provinces and in the Union. There was a time when people here did not seem to have any doubt as to the pattern of executive they would like to set up. The Cabinet system which had been worked with so much success not only in Britain but also in the Dominions was the obvious choice. Responsible government, worked on this model, would at once ensure, they thought, proper efficiency in administration and due deference to public opinion. But divergent interests which were latent in the Indian body politic have of late been brought out into prominence. It is necessary that the executive, if it is to command the confidence of all these interests, should include their accredited representatives. The inclusion of such representatives of all these interests may, however, undermine the unity and harmony of the Cabinet and do away on that account not only with its joint responsibility but also with its efficiency as the supreme executive directory. That is why people are asking if some alternative form of executive may not be devised so as to include in it representatives of all elements without, however, undermining its efficiency and strength.

One of the obvious alternative suggestions is that India may very well make an experiment with the American system of presidential government. It has several features—(i) the executive is singular and not collegiate (ii) it is elected by the people independently of the legislature, (iii) it is elected for a fixed term and not during the pleasure of the legisla-

ture and (iv) it is not responsible to the legislature for its actions during its term of office. The framers of the United States Constitution believed firmly that if the executive was to possess to the requisite degree those qualities and virtues without which it would be a misnomer, it must be constituted by one man. Energy in Government which was born of its unity, secrecy and promptitude could not be ensured, if the executive was a collegiate one and if more than one man had to take responsibility for the policy it was to pursue and the action it was to take. Accordingly the supreme executive authority in the United States was vested in the President. He has a Cabinet. But the members of this body are not his equals and colleagues. They are his subordinates, appointed by him (though with the formal approval of the Senate) and holding office during his pleasure. Elected by the people through electoral colleges for a period of four years at a time, the President is independent of the Congress. He may address this body and send messages to it but otherwise he is out of it and formally cannot guide its deliberations.

Now in India circumstances are absolutely unfavourable to the establishment of this form of executive either for the Union or for the Provinces. When one man was to be elected as the supreme Magistrate of the country, he would inevitably belong to this or that community. He could not at one and the same time belong to all communities. When he would belong to one, he might fail to secure the confidence of the other. In the United States no Roman Catholic has yet been elected to the White House and no American of African origin could even think of standing for election. In fact, as a distinguished writer has observed, only those who are part and parcel of the Anglo-Saxon governing class can ever aspire to reach that sanctum.[1] Such a possibility cannot

[1] Andre Siegfried—America Comes Of Age, p. 273.

fit in, in any way, with Indian conditions. It may be pointed out that when the supreme Magistrate is elected from one community, some important portfolios of his Cabinet may be filled by people of other communities. But if the Presidential system, as America has worked it, is to be introduced in this country, we should be very clear about this in our mind that the authority of the President cannot be balanced by the members of his Cabinet who will be his subordinates and not his equals.

So, if responsible government may have to be ruled out on the ground that all interests cannot be properly harmonised in the Cabinet, Presidential Government of the American type has to be summarily dismissed from our speculation on the same ground. It may of course be suggested that the term of the supreme executive may be fixed and it may be arranged that no person would be eligible for election for more than one term. Then either by law or by convention it may be arranged that diffieret communities will by rotation be represented in this office. But it is doubtful that this principle which may suit the Mayoral election in an important town or the Speaker's election in a legislative assembly may be applied with equal public approval to the election of the supreme Magistrate of the country or the Province. If his was only a semi-judicial office of presiding over an assembly, this arrangement may be appropriate. But the President, as America knows him, embodies all the executive power of the Government which he heads and consequently it will be too light-hearted to think that he might move to and fro from one community to another without reference to the exigencies of political life or governmental necessity.

Besides, there are other weighty reasons why the Presidential system may not be suitable to Indian conditions. It must be remembered that although this system has been worked with considerable success in the United States for more than one hundred and fifty years and although during

this period people there have become accustomed to this governmental arrangement, still now and again voices are heard even in that country against the continuance of the Presidential system. In the last century Woodrow Wilson, who later filled the Presidential role so appropriately, made a vigorous onslaught on this system and pointed out with logic and facts that the British Cabinet system ensured better government and more efficient administration. The Presidential system presupposed segregation of executive and legislative departments into water-tight compartments. But modern government could not smoothly and effectively be conducted without full co-operation between the two. While the executive should be influenced by opinion in the legislature, the latter also could not discharge its responsibilities properly and efficiently without executive guidance. Wilson in fact deprecated congressional government without executive leadership with all the emphasis he could command. He brought out its absurdity in lurid colours. Informally and unofficially co-operation is, of course, often ensured between the two branches in the USA and the President assumes leadership in respect of legislative policy. But such co-operation which can only be informal and behind the scenes cannot be guaranteed for all time. It presupposes a face of politics which, however, changes. President Truman, for instance, has now lost the leadership which President Roosevelt exercised with such vigour and adroitness in peculiar circumstances.

In India democratic legislatures have not been in existence for long. During the few decades that they have been at work, they have fulfilled their responsibilities and discharged their obligations under the guidance and leadership of the executive. It should be remembered in this connection that the legislative councils in India started their career merely as an extension of the executive body. Later also as independent bodies under Dyarchy and Provincial Autonomy,

legislatures have worked under the leadership of members of the Executive Council or Ministers. The central legislature also has similarly conducted its activities so far under the guidance of members of the Viceroy's Executive Council. It will be going violently against this background to introduce separation between the legislature and the executive as it obtains in the United States. Besides as these legislatures will invariably contain divergent elements it may not be possible for them on their own account to evolve an effective but reasonable legislative policy. At present all the important Bills are introduced by the Ministers or Executive Councillors as the case may be. Subjects of these Bills are at first studied and digested in the Departments. The Bills are then drafted, discussed threadbare in the Cabinet, modified and amended there when necessary and then see the light of day. Even then no one will deny that not unoften the Bills are not only unreasonable in many of their provisions but actually half-baked in form and texture. We may imagine then how this legislative responsibilty will be carried out by the assemblies in the absence of executive leadership and guidance.

There is one other ground on which also the American system is unacceptable to the Indian people. Indian executive has always been of a collegiate character. Its authority has been vested in the Governor-General in Council. Since the days of Cornwallis the Governor-General has exercised, no doubt, an over-riding power over his Council. But normally it is the Council working under the leadership and chairmanship of the Governor-General, which has been responsible for the governance of India. In several of the Provinces, it is true, actual administration was vested for many decades in a Lieutenant-Governor or Chief Commissioner ruling without a Council. But since the inauguration of the Montagu-Chelmsford Reforms in 1921 Council Government has been in operation everywhere. In fact for years there was an agita-

tion against the continuance of one-man rule as the Lieutenant-Governors embodied. In view of this tradition it is unlikely that the American Presidential system of which one-man rule is the main plank will be acceptable to Indian public opinion. It is true that the man who will rule under this system will be elected by the people and enjoy their confidence. But all the same as his voice alone will ultimately count in the executive government, it will be a one-man rule inconsistent with recent traditions and unwelcome to the new democratic ideals.

When responsible government under the Act of 1935 was worked for about two years, it created discontent among the Muslim minority in Hindu majority areas and among the Hindu minority in Muslim majority areas. Some Indian scholars, therefore, came out with the suggestion that Party government was unsuited to Indian circumstances and should be replaced by some such system of executive as obtained in Switzerland. Later in 1943 the Swiss model was prominently held before the Indian public by Sir Reginald Coupland in the third part of his book already referred to. Now let us see what the Swiss system is. The executive authortiy of the Swiss Confederation is vested in the Federal Council consisting of seven members. It should be emphasised that the Government is collegiate, the Federal Council and not its individual members as such being responsible for the executive administration. All the seven members are elected for a fixed term in in a joint session of the two houses of the federal legislature. This term coincides with the term of the lower house of the legislature. In case there is a vacancy by death or resignation in the Federal Council, the vacancy is filled for the remaining portion of the unexpired term. The members of the Federal Council as a rule are, but under the Constitution need not necessarily be, elected from the Federal Assembly. Once elected to the Federal Council, its members may attend sittings of both houses, participate in their deliberations, and

even introduce Bills but cannot vote. One of the members of the Federal Council is elected by the legislature as President and another as Vice-President for one year. The member who is elected as President acts not only as the Chairman of the Federal Council but becomes the President for the year of the Swiss Confederation. As Chairman of the Federal Council he is only *primus inter pares*. He has no powers which his colleagues do not share and enjoy. When the year is over he lays down his office not as member but as President and the Vice-President of the previous year is by custom invariably elected to step into his shoes.

The relations between the Federal Council and the federal legislature are peculiar. It is responsible to the legislature only in the sense that it is bound by any decision arrived at by the latter. But it is not responsible to the legislature in the sense that it is removable by the latter. In fact the legislature may disapprove of any action or contemplated action of the Federal Council. But the members of the Council are not to resign on that account, but are to bow down to the decision of the legislature. In fact, it is common for the legislature to issue instructions to the Federal Council in the form of "postulates" or resolutions and these are binding upon the members of the Federal Council in respect of those administrative affairs with which they are connected.

The members of the Federal Council have no doubt to act as a Council but are not bound to present always a united front in the legislature. In practice they are not unoften found supporting opposite points of views. It should in fact be remembered that they are not only chosen from different linguistic areas of the country but from different political parties and groups. It is not expected on this account that the members should look at questions from the same angles and be imbued with the same ideals. But as the policy behind their activities is formulated not by themselves but by the legislature, the Council cannot be torn by

sharp differences of opinion. The Federal Council, it should be repeated, is not to determine the policy and lay down the principles. These are the functions of the legislature. The Federal Council is only to decide as to how best a policy already enunciated may be given effect to. In other words the members of the Federal Council are but executive officers of the Federal Asembly. This is illustrated still further by the fact that members of the Federal Council once elected are allowed to remain in office term after term irrespective of the strength of the political groups which they might have initially represented. ...

The Republican Party in the United States is known to hold the view that the President is nothing but the executive officer of the Congress.[2] It has not, of course, been possible for this Party to hold this point of view uniformly. Neither Abraham Lincoln in the last century nor Theodore Roosevelt in the present century accepted this view of the President's position. They did not differ from the Democrats in regarding the President as a repository of independent powers. Their idea was that the President was the first Magistrate of the country and the only accredited leader of the nation. But for several decades in the nineteenth century the Republicans acted up to the principle that the President was only to execute the policy and carry out the decisions of the Congress. This was the worst period of Congressional rule which Woodrow Wilson deplored so much. It will, however, be noticed that there is a striking parallel between this position of the United States President and the Swiss Federal Council.

The question is why then this position assigned to the President in the U.S.A. by the Republicans was regarded as humiliating to the President and disastrous to the country. Nobody, it should be emphasised, discovered any incongruity

[2] W. E. Binkley—The Powers of the President, 1937. pp89-90, p121, p145.

in the position of the Swiss Federal Council. Nor did anybody look upon this position of the Federal Council as inconsistent with the interests of efficient government in Switzerland. This difference in approach can be explained only by the differences in the conditions of the two countries. The system which may suit a small country and a small body of people with a simple civilisation may be out of tune with the circumstances of a country in which there are a vast territory, a large and growing population, a complex civilisation and sharp differences of race and colour.[3] Actually there is a parallel between the Swiss system of executive and the kind of executive we often notice in municipal institutions, particularly of Britain. In such institutions the policy is formulated either by the municipal council or by its committees. The executive officers may help them in such formulation but their main business is to carry out the policy as as laid down by the council and its committees. In fact Switzerland is a small country, with comparatively simple problems of government. It is a neutralised country without the anxieties of a foreign and defence policy which occupy so much the mind of other govermerts. It is true that the World Wars put some strain upon the Swiss authorities but in spite of it the problems facing the Swiss Government are not as intricate as elsewhere they are. So, the Swiss governmental affairs should be compared more to the municipal affairs of other countries than to their national problems. It is appropriate on this account that Switzerland has a system of executive akin to the municipal executives of some countries.

The Swiss system, though recommended by some well-

[3] The observations made by a recent writer in respect of another but parallel case may be appropriately quoted here: "Comparison of small things with great is likely to mislead, and what is easily possible in the laboratory is not necessarily practicable on a grand scale". See Europe and the Swiss System in the Contemporary Review, February, 1947.

known men for adoption in India, will not suit either Indian conditions or Indian traditions. We have already seen that that to thrust too much responsibility upon the legislatures in India, as the Swiss system will inevitably do, will be inviting breakdown in administration. Secondly, it should not be expected in the Indian background that an executive body will differ from the stand-point of the majority in the legislature or will be over-ruled by this majority and will still remain in office. The legislature will not tolerate a ministry which it has over-ruled or defeated. Nor will the ministry regard it as convenient to remain in office after it has failed to secure the approval of the legislature for any of its major policies. Then again there is the problem of joint action by men of different political affiliations. Such joint action is one of the fundamentals of the Swiss system. But it will be examined at a slightly later stage to what extent co-operation between different party elements is possible inside a cabinet in India. Here it is enough to issue the warning that such co-operation may not always be feasible.

As the above analysis must have shown, neither the American Presidential system nor the Swiss compromise system will be suited to Indian circumstances. We have, therefore, to fall back upon the principle of responsible government. We have, however, to see if any modification of this system is desirable and feasible. That it is desirable, nobody will deny to-day. To set up merely a party Committee in power and to exclude from it the representatives of other groups is to invite discontent and trouble. Particularly when parties are formed in practice, though not necessarily in theory, on a religious basis, there is hardly a chance for the minority to become the majority. But in Britain or the Dominions a party government becomes acceptable only because the party in power cannot long maintain its ascendancy and has to give place sooner or later to the party in opposition. In our country, however, a minority

cannot ever expect to be majority and consequently an exclusive party Government means the permanent exile of the minority from the seat of authority.

In Canada the racial and religious minority of Quebec is invariably and adequately represented in the Dominion Cabinet. This is due to the fact that the French Canadians are represented in the Dominion legislature not as such but as members of the two national parties. In fact the French Canadians at Ottawa look at problems of government not usually as a racial and religions minority but as Liberals or Progressive Conservatives. Consequently in the Cabinet they cannot be a disjointed element. But in India a minority elected through its own separate electorate on a ticket exclusively its own is not likely to throw its mind into the common stock but always to maintain its identity and look at problems from its own exclusive angle. That this is not a figment of imagination but a stern reality has been proved by the experiences of the Interim Government of India. So long as the system of separate electorates will continue and so long as composite parties may not replace on this account the existing religious parties, composite Cabinets may became difficult to form and more difficult to work. Not unoften we hear that coalition or national governments in England are an example for us to follow. It should, however, be borne in mind that such coalitions are formed only in an emergency like war. On such an occasion all energy is concentrated on meeting this emergency which affects all parties and differences of outlook are pushed into the background. So long as this unity of purpose continues, the coalition stands. But as peace returns divergence in outlook becomes prominent and the coalition inevitably dissolves. A composite Cabinet in India today does not really mean a Cabinet which includes Hindus, Muslims and other minorities, but it does mean a Cabinet which would contain Hindus and Muslims of different parties with diametrically opposite

programmes and platforms. To form such a Cabinet is really to form a Government within a Government.

Consequently to insist on composite governments without changing the principle of electoral organisation is to invite disaster. In its absence there may be discontent outside and the Government may not be as just and efficient as it is expected to be. But in its presence there may be constant friction inside the Government resulting in its breakdown after a time. In view of this it should be arranged that in the future those minorities, which agree to forego separate electorates and accept joint electorate with or without reservation of seats, will alone be included in the Cabinet. In case, however, a majority insists on a separate electorate and on that account a minority in a province does not get the advantage of joint electorate, its accredited representatives should all the same be included in the Cabinet.

There should be again some modification in the mode of composing the Cabinet. At the present time the majority party elects its leader and he is appointed by the Governor the Chief Minister. Then on his nomination the other Ministers are appointed by the Governor and included in the Cabinet. In the future the Chief Minister may be first elected by the lower house of the legislature and the other Ministers may thereafter be similarly elected by the same house to form the Cabinet with the Chief Minister. This arrangement will not modify to any appreciable extent the existing system. In regard to the Chief Minister the difference will be only this that while he is at present elected by the majority of the majority party, in the future he will be elected by the majority of the Legislative Assembly.

On most occasions this will be a difference without a distinction. But on some occasions the difference may be real. There may be dissenssions in the majority party as in Madras recently or as in C.P. in 1938. On such occasions. the bare majority of the majority party may be really a mino-

rity in the whole house. In view of this it should not be wise to entrust the election of the Chief Minister to the majority party. As regards the other Ministers, who are now the nominees of the Chief Minister, their election should come after that of the Chief Minister so that the latter may have an opportunity of submitting a list of his nominees. Election by the legislature will have this advantage that while the Chief Minister will have an opportunity of placing his own list before the chamber, the opposition may suggest names as substitutes for some in the list. If the suggested substitutes are better, the Chief Minister may accept them. Otherwise he will always have a majority to carry his own list. An opportunity will thus be opened out to the minorities in the house to influence the composition of the Ministry. It should also be remembered that sometimes a party without any majority in the house has been entrusted with the formation of a Ministry. In Bengal for instance in 1943 resignation was extorted from a Ministry which still commanded a majority in the Legislative Assembly and a party, still in a minority, was installed in power. By the arrangement suggested above, to form a ministry without the immediate support of the majority will be impossible.

CHAPTER XIII

DOMINION STATUS OR INDEPENDECE

In the opinion of many at the present stage of India's political development the question does not arise whether India should be an independent republic or a British Dominion with the same status as is enjoyed by Canada or Australia. As early as 1929 the Indian National Congress adopted the Independence Resolution at its annual session at Lahore. 'Quit India' Resolution of 1942 was another important land mark in the history of this movement for full and complete independence. Both in the Cripps' Proposals of 1942 and in the Cabinet Mission proposals of 1946 it was left entirely to the Indians themselves to decide whether they would allow their country to remain inside the British Commonwealth or launch it on an independent career of its own outside that conglomeration of self-governing states. In view of these declarations many in India today may think it a political folly not to avail this opportunity for independence.

It is pointed out with considerable cogency that the British Commonwealth is kept together by identity of race and identity of interests born of that racial indentity. India with its population affiliated to completely different racial stocks will be only a discordant element in that Commonwealth and will consequently not serve either its own interests or the interests of its fellow members. Not to speak of Indians, many distinguished men of other Dominions also recognise this fact and appreciate India's unwillingness to remain inside the Commonwealth. Mr. Richard Casey of Australia who was Governor of Bengal until a year ago has

recently in a statement pointed out that there would be no sense in India's membership of the British Commonwealth. The treatment which the Indian settlers have received in other Dominions and sometimes in Britain itself brings out into clear relief the irony of India's position in the Commonwealth. While people of Britain and other Dominions are free to move to and settle in any part of the Commonwealth, restrictions on Indians in this regard are wellknown. The vile treatment of Indian settlers, particularly in South Africa, has made the Commonwealth anathema to a large section of the Indian people. Recently when the Indian case against South Africa was in the agenda of the United Nations Organisation, the part played by Field Marshal Smuts and his colleagues was only expected. But the zest with which the British Attorney-General took up the brief of South Africa and fought against the Indian delegates on the U.N.O. platform confirmed even many friendly Indians in their suspicions about the Commonwealth. In fact, the policy of the British Government in this regard was singularly inexplicable. If the Attorney-General remained simply neutral and did not take sides, South Africa would not have lost anything more than it did and India would not have been alienated as it actually was. It was really an indiscretion unpardonable for a great Government.

While, it is pointed out, India would not gain anything by remaining inside the Commonwealth, it may lose much by remaining there. First, it should be borne in mind that Dominion Status cannot be legally defined. Although the Statute of Westminster provides for complete autonomy of the Dominions in internal and external affairs, Dominion Status has some elasticity about it. In view of the past relations between India and Britain, it may be a loophole for British intervention in India's affairs on crucial occasions. This is a danger which can be avoided only by the assertion of complete independence. Secondly,

as Pandit Nehru has emphasised, India has no interest in power politics and is unwilling to take sides if a struggle between the great powers becomes inevitable. Besides, there are countries in Asia and Africa with which India would like to establish relations according to its own interests and not according as the interests of Britain or the Commonwealth may demand. In view of these facts it is necessary that India should be an independent Republic and not a Dominion.

The facts and arguments stated above cannot be refuted very easily. But without attempting to refute them, one may put in other considerations in the light of which the question of India's remaining inside the Commonwealth may be approached. There is no gainsaying the fact that it is a hard world in which we are living to-day. Our preparations for meeting this reality are little or nil. Our fighting materials are excellent. That has been proved on many fronts and on many occasions. But for over a century they have been used only under British leadership. It is yet to be experimented how in the modern world our army can acquit itself in the absence of that leadership. Indian Air Force has again excellent exploits to its credit. But it has yet to be developed to its full stature. As for the Navy it is still in its infancy. Industrialisation which is the bedrock of defence has not, due unfortunately to British indifference, proceeded as fast as it might have. In diplomacy we have just begun the three R's. These facts might have been, of course, otherwise if the British Government so desired them to be earlier. But whatever be the causes the facts are as they are.

In view of what is stated above we should think hard thoughts before launching ourselves on the uncharted sea of freedom. It is true racial unity makes success of Dominion Status and its absence may retard it. But connection of India with Britain extends over a long period. Much of this long history is very sordid and neither Britain nor India should be proud of it. But throughout this history there have

been great men in Britain who have befriended the Indian people. They have not only imbued our mind with new thoughts and ideals but in practical politics also they have exercised an influence benevelent to Indian interests. In this hour of destiny when Britain has decided to withdraw its political control it may do us good to think that the ideals of these great men are at last shaping not only the policy of the British Government but the outlook of the British people. If we believe this it may be possible for us to approach Dominion Status with an easier mind.

We have referred in a previous paragraph to the suspicion that Dominion Status for India may only constitute the thin end of the wedge of British control over us. But even if India is to be an idependent Republic, a treaty will have to be signed with Britain. We do not yet know what provisions that treaty will include. It is, however, expected that there will be a provision therein regading British military assistance for a specified period. If that does not mean British control over Indian affairs, Dominion Status will not certainly mean it. On the contrary Dominion Status, inspite of its supposed elasticity, represents something clear and definite.[1] Examples of Canada and Australia will always be there. Any deviation will always be noticed and may be rectified. But control through a treaty may be more elastic and more far-reaching. Besides, if India becomes a Dominion, there will be no bar to its following its own foreign policy. Canada, inspite of its historical relations and racial affinity with Britain and great friendship for the British people, has not only become an international unit but is every day drawing closer to the United States. This is due to geogra-

[1] K. M. Panikkar who thinks that the future of India is bound up with Britain, that the interests of both Britain and India, particularly these of defence, may be safeguarded only by mutual co-operation, advocates Indo-British Alliance See The Future of South East Asia (George Allen and Unwin Limited) Chapter V. Also The Basis of an Indo-British Treaty (Oxford University Press).

phical reasons. For the same reasons, it is inevitable that India will draw to Asiatic countries in the future.

So at least for a period it will serve our purposes better to remain inside the Commonwealth, the membership of which will ensure to us facilities in many important and vital matters which otherwise it may be difficult for us to secure. If this experiment does not prove successful, it will be always open to India to secede from the Commonwealth. The right of secession is a concomitant of Dominion Status and that being so, there is at least no harm in accepting that status in the initial stage of our freedom. The division of India reinforces further the argument for remaining inside the commonwealth. The establishment of Pakistan on the basis of Dominion Status will complicate India's position. It may be easier for it to meet these complications better from inside the Commonwealth than from outside.

POSTSCRIPT

PLAN OF JUNE 3, 1947.

As the preceding pages were set in type, the much awaited declaration of His Majesty's Government regarding the procedure of transferring power to Indian hands was made almost simultaneously from New Delhi and London on June 3, 1947. The New Delhi announcement was preceded by a radio address by the Viceroy and was followed by similar addresses by Pandit Nehru, Mr. Jinnah and Sardar Baldev Singh.

The Viceroy pointed out in his address that as there could be no agreement between the Muslim League and the Congress about the unity of the country being maintained, His Majesty's Government had reluctantly to propose the principle of division. It would, however, be for the Indians themselves to decide, according to a certain procedure laid down in the Statement, whether there would be such a division or not. It should be remembered in this connection that the Muslim League had demanded the whole of the existing province of the Punjab, the Frontier Province, Sind and British Baluchistan in the North-West and the whole of the existing province of Bengal and the whole of the existing province of Assam in the North-East, to be included in Pakistan which would be a sovereign state. But the Punjab, Bengal and Assam contained predominantly Hindu areas which could not be assigned to Pakistan without grave injustice to the Hindu population concerned. Accordingly, the principle of partitioning these three provinces were proposed in the event of India being divided.

The basic principle adopted in the Statement was that while British India with its existing boundaries would be treated as a unit for the transference of power, the predominantly Muslim areas would have the right of secession for incorporation in a separate Pakistan State. The Legislative Assembly[1] of Sind, which is a predominantly Muslim area, would, for instance, be called upon to declare by a resolution whether it would join the existing Indian Constituent Assembly or prefer to join the Pakistan Constituent Assembly to be set up. The existing Legislative Assemblies (minus their European members) of Bengal and the Punjab might also be invited to pass resolutions[2] by which they would declare either their adherence to the Indian Constituent Assembly which has been sitting at New Delhi since December last or their preference for the proposed Pakistan Constituent Assembly. But immediately after either Legislative Assembly would pass this resolution, it would sit into two parts, one part consisting of the representatives of the predominantly Muslim districts and the other part representing the rest of the province. Either part might, by a simple majority, decide in favour of the partition of the province[3] and indicate its own affiliation to this or that Constituent Assembly.

As for the Muslim League claim to Assam, it has been entertained only in respect of the district of Sylhet. Its future, however, would be dependent on the results of a referendum which would be held after the 'notional' partition of Bengal was decided upon. The existing voters in that district for the Assam Legislative Assembly would be called upon to decide as to whether Sylhet would become part of Pakistan if the Muslim majority areas of Bengal became incorporated in it or whether it would remain, as now, included in Assam. It

[1] Minus European members.

[2] On the demand of any one member.

[3] Such partition was decided upon in Bengal on the 20th June and in the Punjab on the 23rd June, 1947.

was expected that as in Sind, Bengal and the Punjab, the Frontier Province also would decide through its existing Legislative Assembly its future affiliation. But on the ground that there was uncertainty as to this Assembly representing accurately the opinion of the province, the Statement of June 3, provided for a referendum to be held. The existing voters for the Legislative Assembly would be required to declare if they would adhere to the Indian Constituent Assembly or prefer to join the Pakistan Constituent Assembly. The voters would have choice between these two alternatives only. It should be borne in mind in this connection that a movement was already set on foot in the Frontier for declaring that province a separate entity without being included either in the Indian Union or in Pakistan. But the voters would not be allowed to have any say in this regard.

In respect of the Indian States, the Statement of June 3. did not add anything to what had been proclaimed previously as the policy of His Majesty's Government. In other words paramountcy rights vested in the British Crown as to these States would lapse along with the transfer of power to Indian hands in regard to British India. Thereafter the States would be free to shape their future in their own way. The Viceroy was, of course, reported to have stated that they should not remain isolated but should join either Constituent Assembly according as contiguity might make convenient. But he was reported also to have stated that in case any State refused to act up to his advice, he would refer its case to His Majesty's Government. Now all would depend upon the attitude which that Government would take in this regard. With the lapse of paramountcy powers of the Crown, a State may, no doubt, become independent. But such independence to be really valid and effective has to be recognised either by a treaty or by a declaration by important powers of the world. Admission to the U.N.O. as a member would also amount to

such recognition. But this also is not feasible without the support of these powers. Now recognition by other powers is largely, if not wholly, dependent upon British attitude. If Britain recognises the independence of a State, either by treaty or by a formal declaration other powers may follow suit. What will Britain do?

In this connection, it should be emphasised that British policy in respect of the future of the Indian States ought to have been more straightforward than it may be interpreted to have been. It is common knowledge that the States were so long as much under British control as the provinces. The latter might have been administered under parliamentary enactments and the former might have been only subject to the Crown's paramountcy. But so far as Britain's control was concerned, the difference was without a distinction. As Lord Reading emphasised so clearly in 1926, British Crown was supreme throughout India. In view of this fact, the British Government, if it really wanted to avoid vivisection of India and had accepted Pakistan only because it was unavoidable, ought to have put sufficient pressure upon the unwilling States to join either Constituent Assembly. Nor would this have been unconstitutional. Paramountcy involved obligations in respect of maintaining the interests not only of Princes but also of people of the States. It has been proved beyond doubt in more than one way that the people of those States, which are now insisting on independence, are unwilling to remain isolated from the main currents of Indian life and are eager to join the Indian Constituent Assembly. Consequently His Majesty's Government had two alternatives before it. Before abdicating the paramountcy rights of the Crown, it might have either compelled the authorities of the States to act up to the wishes of the people and join the Constituent Assembly or called upon the people to take up the question in their hands and decide, over the head of their Governments, either by referendum as in the North-Western

Frontier Province or by some other suitable method, the future affiliation of their State. In case a Prince or a Minister did not fall in with this procedure, the British Government would have acted consistently with its paramountcy rights and obligations by removing him. It is unfortunate that neither of these alternatives has yet been adopted by His Majesty's Government.

The solution of the Indian problem has been attempted in respect of British India on a democratic basis. The secession of some areas has been allowed because the majority of the people in those areas had asked for it in the last general elections. The solicitude for democratic principles and methods is brought out all the more emphatically in the case of the Frontier Province. In the last elections, the province returned members to the Assembly, the majority of whom would be against joining Pakistan. But as it was doubtful if this majority still represented the majority of the people of the province, the decision was not left in its hands. The future affiliation of the province was to be referred to the voters who woud decide as to what course to take. But why should there be one principle for British India and another for the Indian States? In the latter also democratic methods ought to have been resorted to. Nor, it may be repeated, would this have been unconstitutional. It is the duty of the paramount power to protect the interests of the people of the States. Now what interests of these people could be of greater importance than those of their future status in India? There is, again, another point to consider. In the referendum which has been ordered in the Frontier, the voters would not be entitled to express any opinion as to their province remaining independent. They must only declare whether they would join Pakistan or remain in the Indian Union. Why then should the States be allowed to remain aloof?

The Statement of June 3 and its acceptance by the Con-

gress and League Organisations involve the division of India and the establishment of Pakistan. The history of its demand and the implications of its establishment have been discussed at length in a previous chapter. Here it may only be regretted that the resources of Indian nationalism have at last proved unequal to the challenge of the partitionists. There are many who are actually surprised that those to whom the interests of Indian integrity were confidently entrusted have accepted defeat and yielded ground so easily. Naturally what the Americans did in the last century in circumstances, not very dissimilar, come up rather persistently in their memory. They call to mind how during the thirty years previous to the American Civil War, the Northerners showed infinite patience in understanding the sentimetns and demands of the South and in conciliating it in every possible way. But there was a point beyond which they refused to go. When the Southern States declared their secession and began organising themselves on a separate basis, the Federal Government took up the challenge and refused to resile from the position that its primary duty was to maintain the indestructible union of indestructible states. The position of the leaders of the Indian Union has not, of course, been the same as that of the leaders of the American federation. While the latter had all the resources of an organised and powerful government at their disposal, here in India these resources were under the command of a Government which had fraternised for over four decades with separatist elements and encouraged them on all crucial occasions.

But while odds were against the nationalists, it was also true that no consistent efforts were made to save the nation from being engulfed. On the contrary bit by bit the ground was yielded till the forces of separatism proved too strong. In the interests of permanent peace the Lucknow Pact was entered into in 1916. But only a few years had passed by since then, when fresh demands came forth from

the Muslim side, and year after year these demands began to swell till at last in 1932 the British Prime Minister embodied them in the Communal Award. However anti-national and unjust to the Hindus it might be, the Indian National Congress refused to reject it outright. It passed a resolution in 1934 neither accepting nor rejecting it and this ineptitude certainly helped in sapping the foundations of Indian nationalism. Then in 1940 the two-nation theory was propounded and the demand for Pakistan was made. It was expected that on this issue at least there would be a fight to the last ditch. But the Congress instead took shelter behind a democratic principle and gave up the fight before any shots were fired. In 1942 it adopted the principle that no parts of the country would be forced against their will to remain inside the Indian Union. The adoption of such a resolution was a grievous folly and the persistence with which it was stuck to was suicidal. No state can survive if this principle is logically applied. It should never be forgotten that a state is ultimately based on force and there is a limit to the application of democratic process when the safety and integrity of a state are involved.

In the United States there are few, if any, in the South to-day who regret that the forces of separatism were overwhelmed in the long run by those of the Union. Here in India also, if unionism triumphed to-day, there would have been few separatists who would lament their defeat after a generation. But now that the separatists themselves have gained a victory, could we hope that in the next quarter of a century they will regret the partition and ask for reunion? Indeed, the future of India lies in union and no part can ultimately gain anything by division. But it will be too optimistic to believe that those who have succeeded now in establishing a separate state, will tamely return to the fold of the Indian Union when they will find the resources of their separate state too insufficient and too inadequate for

building up a strong and efficient organisation. It should be borne in mind that as the new state holds on for a few years, interests bound up with its existence will grow and multiply. These vested interests will certainly stand in the way of any serious efforts being made for reunion. It should not also be forgotten in this connection that all states in the world are not strong and powerful. In the Islamic world particularly there are many states which are small, weak, ill-organised and medieval. But who ever heard that out of their own accord they have desired amalgamation with the neighbours so that together they might become strong and powerful and might minister better to the welfare of the people?

Meanwhile partition has been effected and Indian nationalism has been engulfed; but the communal problem remains where it was. Division of India has not been accompanied by an exchange of population. Such an exchange is in all circumstances difficult. It is more difficult in India in view of the number of people involved. Besides, the landed and other properties which the Hindus in Pakistan and Muslims in the Indian Union happen to possess would add further to the complexity of the problem. So the question of exchanging population has not been raised at all in connection with partition. Some individuals may, of course, cross the boundary on their own initiative and responsibility but most are likely to remain where they are. Possibly history will prove this indifferent attitude towards an exchange of population to be a grave blunder. Difficulty of the task ought to have stood in the way of partition. But But when partition was decided upon, it should have been accompanied by an exchange of population, however intricate and difficult the task was. It should not be forgotten that the basis of the partition was the two-nation theory. Each of the two nations was to have a separate state to control and dominate. In fact, until recently Mr. Jinnah pointed

out in no uncertain terms that in Pakistan the Muslims would be the nation and the non-Muslims would not have that status. The implications of such observations have already been brought out in the chapter on Pakistan and need not be reiterated here. Of late, he has, of course, emphasised the need of protecting minority interests in the seceding areas. But in view of the emphasis which has been placed so persistently and for years together on the Muslim character of the Pakistan state, it is yet too early to say how far these assurances will be accommodated in the Pakistan Constitution and even when accommodated there how far they will be acted up to in practice. So the position of the non-Muslims in Pakistan remains uncertain.

What will again be the position of the Muslims preferring to remain in the Indian Union?[4] The Indian National Congress has always rejected the two-nation theory and has always pinned its faith to the principle of safeguarding the political, religious, cultural and economic interests of the minorities. The Constituent Assembly which has been sitting at New Delhi is known to be busy at work in regard to accommodating such safeguards in different chapters of the future Constitution of the Indian Union. It should, however, be borne in mind that the Muslims, high and low, have been, for the last few years, identified almost to a man with the Muslim League and its ideology. Sardar Vallabhai Patel emphasised it in his speech at the All-India Congress Committee meeting at New Delhi (14th and 15th June, 1947). Could it be expected that these Muslims will now give up this ideology and settle down as loyal citizens of the Union? It should be stated in this connection that the Muslim League Council accepted the partition of India on the basis of the partition of Bengal, Punjab and Assam only as a compromise and not as a final settlement. Could it be expected in

[4] It is improbable that many of them will shift their residence to Pakistan.

this context that the Muslims in the Indian Union will, henceforward, regard their interests and sentiments bound up with the Union? This is one of the many complicated matters which both the leaders of the Muslim population in the Union and those of the different other political organisations should ponder over.

Division of India cannot be contemplated with equanimity. But it was accepted by many on the ground that it would make easier the work of the Constituent Assembly for the rest of the country. The incubus of the recommendations of the Cabinet Mission would now be removed. The Constituent Assembly would no longer be required to submit to the rigid limitations which these recommendations imposed upon it. It would, in fact, become henceforward a sovereign body which it was not before. The weak centre and the provision of 'grouping', which would have practically Balkanised India while maintaining a facade of unity, would now be eliminated and the Constituent Assembly would be in a position, without resorting to any subterfuge, to make the Central Government as strong as desirable, particularly in its relations with the provinces. There are some people who hold the view that as the Muslims who constituted the chief decentralising force have been otherwise appeased, there is no reason why the provinces should any longer be treated as federal units. The different provincial areas may now be brought under a central government with the provincial governments acting only as its agents in their respective parts of the country. In other words Provincial India as a whole may now be a unit and the Indian States may federate with it on terms acceptable to both.

But this is an extreme point of view and represents a reaction against the cry for division which has been raised for the last few years so persistently and from so many platforms. The provinces are mostly linguistic units and as such different from one another. While these differences should

not be allowed to take undue proportions, they may have also to be recognised in some definite manner. Provincial autonomy within the bosom of a federal union will be the best form of such recognition. But by provincial autonomy it does not mean that the ambit of authority of the provincial government should be necessarily very wide. Nor does it mean that such authority should be absolute in all circumstances. It only means that the provincial government should have certain definite powers derived directly from the Constitution and should not exercise them on delegation by the Central Government. The relations between the Centre and the units in different federations have been discussed at length in another chapter and it is not necessary to dwell upon them afresh here. It should only be emphasised that simply because a function e.g., the maintenance of law and order, is vested in the provincial government, federalism does not warrant that the Central Government would not have the right to intervene if public interests demand such intervention. Again, simply because, a function *e.g.*, education, is the concern of the provincial government, federalism does not necessarily prohibit the Central Government from supplementing provincial efforts.

It may, of course, be objected that federalism is legalism and although the distribution of powers between different authorities may take place on one basis and with one particular intention at the time of framing the Constitution, its character may change as a result of subsequent judicial review. As in the United States, so in the Indian Union, the judges will be local men, not foreigners as so far in the case of the Dominion of Canada. Consequently they will understand the needs of the country and interpret the provisions of the Constitution in the light of those needs. But all the same, as in the United States, a law will be a law not because the people's representatives in the legislature have made it but because it has been accepted as such by the five judges on the

bench of the Supreme Court. This may create undue handicaps to a speedy and efficient discharge of governmental responsibilities. Federalism, as a rule, involves this judical review and the judicial review allows a handful of judges to set themselves up as a super legislature. But federalism does not make judicial review imperative in all circumstances. In Switzerland, for instance, an enactment of the federal legislature is not subject to review by the Swiss Federal Court. In order that the wide authority given by the Constitution to the Legislature and Government of the Indian Union may not be whittled down in the future by judicial review, it should be examined carefully whether the Swiss principle may not be adopted here in this regard.

APPENDIX I

Statement by the Cabinet Delegation and His Excellency the Viceroy, May 16, 1946.

1. On March 15th last just before the despatch of the Cabinet Delegation to India Mr. Attlee, the British Prime Minister, used these words:—

"My colleagues are going to India with the intention of using their utmost endeavours to help her to attain her freedom as speedily and fully as possible. What form of Government is to replace the present régime is for India to decide; but our desire is to help her to set up forthwith the machinery for making that decision."

* * * *

"I hope that India and her people may elect to remain within the British Commonwealth. I am certan that they will find great advantages in doing so".

* * * *

"But if she does so elect, it must be by her own free will. The British Commonwealth and Empire is not bound together by chains of external compulsion. It is a free association of free peoples. If, on the other hand, she elects for independence, in our view she has a right to do so. It will be for us to help to make the transition as smooth and easy as possible".

2. Charged in these historic words we—the Cabinet Ministers and the Viceroy—have done our utmost to assist the two main political parties to reach agreement upon the fundamental issue of the unity or division of India. After prolonged discussions in New Delhi we succeeded in bring-

ing the Congress and the Muslim League together in Conference at Simla. There was a full exchange of views and both parties were prepared to make considerable concessions in order to try and reach a settlement but it ultimately proved impossible to close the remainder of the gap between the parties and so no agreement could be concluded. Since no agreement has been reached we feel that it is our duty to put forward what we consider are the best arrangements possible to ensure a speedy setting up of the new constitution. This statement is made with the full approval of His Majesty's Government in the United Kingdom.

3. We have accordingly decided that immediate arrangements should be made whereby Indians may decide the future constitution of India and an Interim Government may be set up at once to carry on the administration of British India until such time as a new Constitution can be brought into being. We have endeavoured to be just to the smaller as well as to the larger sections of the people; and to recommend a solution which will lead to a practicable way of governing India of the future, and will give a sound basis for defence and good opportunity for progress in the social, political and economic field.

4. It is not intended in this statement to review the voluminous evidence that has been submitted to the Mission; but it is right that we should state that it has shown an almost universal desire, outside the supporters of the Muslim League, for the unity of India.

5. This consideration did not, however, deter us from examining closely and impartially the possibility of a partition of India; since we were greatly impressed by the very genuine and acute anxiety of the Muslims lest they should find themselves subjected to a perpetual Hindu majority rule.

This feeling has become so strong and widespread amongst the Muslims that it cannot be allayed by mere paper

safeguards. If there is to be internal peace in India it must be secured by measures which will assure to the Muslims a control in all matters vital to their culture, religion, and economic or other interests.

6. We therefore examined in the first instance the question of a separate and fully independent sovereign State of Pakistan as claimed by the Muslim League. Such a Pakistan would comprise two areas; one in the north-west consisting of the Provinces of the Punjab, Sind, North-West Frontier, and British Baluchistan; the other in the north-east consisting of the Provinces of Bengal and Assam. The League were prepared to consider adjustment of boundaries at a later stage, but insisted that the principle of Pakistan should first be acknowledged. The argument for a separate State of Pakistan was based, first upon the right of the Muslim majority to decide their method of Government according to their wishes, and secondly, upon the necessity to include substantial areas in which Muslims are in a minority, in order to make Pakistan administratively and economically workable.

The size of the non-Muslim minorities in a Pakistan comprising the whole of the six Provinces enumerated above would be very considerable as the following figures show:—

	Muslim.	Non-Muslim.
North-Western Area—		
Punjab ..	16,217,242	12,201,577
North-West Frontier Province ..	2,788,797	249.270
Sind ..	3.208,325	1,326,683
British Baluchistan ..	438,930	62,701
	22,653,294	13,840,231
	62.07%	37.93%

North-Eastern Area—			
Bengal	..	33,005,434	27,301,091
Assam	..	3,442,479	6,762,254
		36,447,913	34,063,345
		51.69%	48.31%

The Muslim minorities in the remainder of British India number some 20 millions dispersed amongst a total population of 188 millions.

These figures show that the setting up of a separate sovereign State of Pakistan on the lines claimed by the Muslim League, would not solve the communal minority problem; nor can we see any justification for including within a sovereign Pakistan those districts of the Punjab and of Bengal and Assam in which the population is predominantly non-Muslim. Every argument that can be used in favour of Pakistan, can equally in our view be used in favour of the exclusion of the non-Muslim areas from Pakistan. This point would particularly affect the position of the Sikhs.

7. We therefore considered whether a smaller sovereign Pakistan confined to the Muslim majority areas alone might be a possible basis of compromise. Such a Pakistan is regarded by the Muslim League as quite impracticable because it would entail the exclusion from Pakistan of (*a*) the whole of the Ambala and Jullundur Divisions in the Punjab; (*b*) the whole of Assam except the district of Sylhet; and (*c*) a large part of Western Bengal, including Calcutta, in which city the Muslims form 23.6% of the population. We ourselves are also convinced that any solution which involves a radical partition of the Punjab and Bengal, as this would do, would be contrary to the wishes and interests of a very large proportion of the inhabitants of these Provinces. Bengal and the Punjab each has its own common language and a long history and tradition. Moreover, any division of

the Punjab would of necessity divide the Sikhs leaving substantial bodies of Sikhs on both sides of the boundary. We have therefore been forced to the conclusion that neither a larger nor a smaller sovereign State of Pakistan would provide an acceptable solution for the communal problem.

8. Apart from the great force of the foregoing arguments there are weighty administrative, economic and military considerations. The whole of the transportation and postal and telegraph system of India have been established on the basis of a united India. To disintegrate them would gravely injure both parts of India. The case for a united defence is even stronger. The Indian armed forces have been built up as a whole for the defence of India as a whole, and to break them in two would inflict a deadly blow on the long traditions and high degree of efficiency of the Indian Army and would entail the gravest dangers. The Indian Navy and Indian Air Force would become much less effective. The two sections of the suggested Pakistan contain the two most vulnerable frontiers in India and for a successful defence in depth the area of Pakistan would be insufficient.

9. A further consideration of importance is the greater difficulty which the Indian States would find in associating themselves with a divided British India.

10. Finally there is the geographical fact that the two halves of the proposed Pakistan State are separated by some seven hundred miles and the communications between them both in war and peace would be dependent on the goodwill of Hindustan.

11. We are therefore unable to advise the British Government that the power which at present resides in British hands should be handed over to two entirely separate sovereign States.

12. This decision does not, however, blind us to the very real Muslim apprehensions that their culture and political and

social life might become submerged in a purely unitary India, in which the Hindus with the greatly superior numbers must be a dominating element. To meet this the Congress have put forward a scheme under which Provinces would have full autonomy subject only to a minimum of Central subjects, such as Foreign Affairs, Defence and Communications..

Under this scheme Provinces, if they wished to take part in economic and administrative planning on a large scale, could cede to the Centre optional subjects in addition to the compulsory ones mentioned above.

13. Such a scheme would, in our view, present considerable constitutional disadvantages and anomalies. It would be very difficult to work a Central Executive and Legislature in which some Ministers, who dealt with Compulsory subjects, were responsible to the whole of India while other Ministers, who dealt with Optional subjects, would be responsible only to those Provinces which had elected to act together in respect of such subjects. This difficulty would be accentuated in the Central Legislature, where it would be necessary to exclude certain members from speaking and voting when subjects with which their Provinces were not concerned were under discussion.

Apart from the difficulty of working such a scheme we do not consider that it would be fair to deny to other Provinces, which did not desire to take the optional subjects at the Centre, the right to form themselves into a group for a similar purpose. This would indeed be no more than the exercise of their autonomous powers in a particular way.

14. Before putting forward our recommendation we turn to deal with the relationship of the Indian States to British India. It is quite clear that with the attainment of independence by British India, whether inside or outside the British Commonwealth, the relationship which has hitherto

existed between the Rulers of the States and the British Crown will no longer be possible. Paramountcy can neither be retained by the British Crown nor transferred to the new Government. This fact has been fully recognised by those whom we interviewed from the States. They have at the same time assured us that the States are ready and willing to co-operate in the new development of India. The precise form which their co-operation will take must be a matter for negotiation during the building up of the new constitutional structure, and it by no means follows that it will be identical for all the States. We have not therefore dealt with the States in the same detail as the Provinces of British India in the paragraphs which follow.

15. We now indicate the nature of a solution which in our view would be just to the essential claims of all parties, and would at the same time be most likely to bring about a stable and practicable form of constitution for All-India.

We recommend that the constitution should take the following basic form;—

(1) There should be a Union of India, embracing both British India and the States, which should deal with the following subjects: Foreign Affairs, Defence, and Communications; and should have the powers necessary to raise the finance required for the above subjects

(2) The Union should have an Executive and Legislature constituted from British Indian and States representatives. Any question raising a major communal issue in the Legislature should require for its decision a majority of the representatives present and voting of each of the two major communities as well as a majority of all the members present and voting.

(3) All subjects other than the Union subjects and all residuary powers should vest in the Provinces.

(4) The States will retain all subjects and powers other than those ceded to the Union.

(5) Provinces should be free to form Groups with executives and legislatures, and each Group could determine the Provincial subjects to be taken in common.

(6) The constitutions of tthe Union and of the Groups should contain a provision whereby any Province could, by a majority vote of its Legislative Assembly, call for a reconsideration of the terms of the constitution after an initial period of 10 years and at 10 yearly intervals thereafter.

16. It is not our object to lay out the details of a constitution on the above lines, but to set in motion the machinery whereby a constitution can be settled by Indians for Indians.

It has been necessary however for us to make this recommendation as to the broad basis of the future constitution because it became clear to us in the course of our negotiations that not until that had been done was there any hope of getting the two major communities to join in the setting up of the constitution-making machinery.

17. We now indicate the constitution-making machinery which we propose should be brought into being forthwith in order to enable a new constitution to be worked out.

18. In forming any Assembly to decide a new Constitutional structure the first problem is to obtain as broad-based and accurate a representation of the whole population as is possible. The most satisfactory method obviously would be by election based on adult franchise; but any attempt to introduce such a step now would lead to a wholly unacceptable delay in the formation of the new Constitution. The only practicable alternative is to utilize the recently elected Provincial Legislative Assemblies as the electing bodies. There

are, however, two factors in their composition which make this difficult. First, the numerical strengths of the Provincial Legislative Assemblies do not bear the same proportion to the total population in each Province. Thus, Assam with a population of 10 millions has a Legislative Assembly of 108 members, while Bengal, with a population six times as large, has an Assembly of only 250. Secondly, owing to the weightage given to minorities by the Communal Award, the strengths of the several communities in each Provincial Legislative Assembly are not in proportion to their numbers in the Province. Thus the number of seats reserved for Muslims in the Bengal Legislative Assembly is only 48% of the total, although they form 55% of the Provincial population. After a most careful consideration of the various methods by which these inequalities might be corrected, we have come to the conclusion that the fairest and most practicable plan would be—

(*a*) to allot to each Province a total number of seats proportional to its population, roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage,

(*b*) to divide this provincial allocation of seats between the main communities in each Province in proportion to their population,

(*c*) to provide that the representatives allotted to each community in a Province shall be elected by the members of that community in its Legislative Assembly.

We think that for these purposes it is sufficient to recognise only three main communities in India: General, Muslim and Sikh, the "General" community including all persons who are not Muslims or Sikhs. As the smaller minorities would, upon the population basis, have little or no representation since they would lose the weightage which assures them

seats in the Provincial Legislatures, we have made the arrangements set out in paragraph 20 below to give them a full representation upon all matters of special interest to the minorities.

19. (*i*) We therefore propose that there shall be elected by each Provincial Legislative Assembly the following numbers of representatives, each part of the Legislature (General, Muslim or Sikh) electing its own representatives by the method of proportional representation with the single transferable vote:—

Table of Representation.

SECTION A.

Province.	General.	Muslim.	Total.
Madras	45	4	49
Bombay	19	2	21
United Provinres	47	8	55
Bihar	31	5	36
Central Provinces	16	1	17
Orissa	9	0	9
Total	167	20	187

SECTION B.

Province.	General.	Muslim.	Sikh.	Total.
Punjab	8	16	4	28
North-West Frontier Province ..	0	3	0	3
Sind	1	3	0	4
Total ..	9	22	4	35

SECTION C.

Province.	General.	Muslim	Total.
Assam ..	7	3	10
Bengal ..	27	33	60
Total ..	34	36	70
Total for British India ..	..	..	292
Maximum for Indian States ..	..	..	93
Total	..	..	385

Note.—In order to represent the Chief Commissioners' Provinces there will be added to Section A the Member representing Delhi in the Central Legislative Assembly, the Member representing Ajmer-Merwara in the Central Legislative Assembly, and a representative to be elected by the Coorg Legislative Council.

To Section B will be added a representative of British Baluchistan.

(*ii*) It is the intention that the States should be given in the final Constituent Assembly appropriate representation which would not, on the basis of the calculations adopted for British India, exceed 93, but the method of selection will have to be determined by consultation. The States would in the preliminary stage be represented by a Negotiating Committee.

(*iii*) The representatives thus chosen shall meet at New Delhi as soon as possible.

(*iv*) A preliminary meeting will be held at which the general order of business will be decided, a Chairman and other officers elected, and an Advisory Committee (see paragraph 20 below) on the rights of citizens, minorities, and tribal and excluded areas set up. Thereafter the provincial representatives will divide up into the three sections shown under A, B and C, in the Table of Representation in sub-paragraph (*i*) of this paragraph.

(*v*) These sections shall proceed to settle the Provincial Constitutions for the provinces included in each section, and shall also decide whether any Group Constitution shall be set up for those Provinces and, if so, with what provincial subjects the Group should deal. Provinces shall have the power to opt out of the Groups in accordance with the provisions of sub-clause (*viii*) below.

(*vi*) The representatives of the Sections and the Indian States shall reassemble for the purpose of settling the Union Constitution.

(*vii*) In the Union Constituent Assembly resolutions varying the provisions of paragraph 15 above or raising any major communal issue shall require a majority of the representatives present and voting of each of the two major communities.

The Chairman of the Assembly shall decide which (if any) of the resolutions raise major communal issues and shall, if so requested by a majority of the representatives of either of the major comunities, consult the Federal Court before giving his decision.

(*viii*) As soon as the new constitutional arrangements have come into operation, it shall be open to any Province to elect to come out of any Group in which it has been placed. Such a decision shall be taken by the new legislature of the Province after the first general election under the new constitution.

20. The Advisory Committee on the rights of citizens, minorities, and tribal and excluded areas should contain full representation of the interests affected, and their function will be to report to the Union Constituent Assembly upon the list of Fundamental Rights, the clauses for the protection of minorities, and a scheme for the administration of the tribal and excluded areas, and to advise whether these rights should be incorporated in the Provincial, Group, or Union Constitution.

21. His Excellency the Viceroy will forthwith request the Provincial Legislatures to proceed with the election of their representatives and the States to set up a Negotiating Committee. It is hoped that the process of constitution-making can proceed as rapidly as the complexities of the task permit so that the interim period may be as short as possible.

22. It will be necessary to negotiate a Treaty between the Union Constituent Assembly and the United Kingdom to provide for certain matters arising out of the transfer of power.

23. While the constitution-making proceeds, the administration of India has to be carried on. We attach the greatest importance therefore to the setting up at once of an interim Government having the support of the major political parties. It is essential during the interim period that there should be the maximum of co-operation in carrying through the difficult tasks that face the Government of India. Besides the heavy task of day-to-day administration, there is the grave danger of famine to be countered; there are decisions to be taken in many matters of post-war development which will have a far-reaching effect on India's future; and there are important international conferences in which India has to be represented. For all these purposes a Goverment having popular support is necessary. The Viceroy has already started discussions to this end, and hopes soon to form an Interim Government in which all the portfolios, including that of War Member, will be held by Indian leaders having the full confidence of the people. The British Government, recognising the significance of the changes in the Government of India, will give the fullest measures of co-operation to the Government so formed in the accomplishment of its tasks of administration and in bringing about as rapid and smooth a transition as possible.

24. To the leaders and the people of India who now have the opportunity of complete independence we would finally say this. We and our Government and countrymen hoped that it would be possible for the Indian people themselves to agree upon the method of framing the new constitution under which they will live. Despite the labours which we have shared with the Indian Parties, and the exercise of much patience and goodwill by all, this has not been possible. We therefore now lay before you proposals which, after listening to all sides and after much earnest thought, we trust will enable you to attain your independence in the shortest time with the least danger of internal disturbance

and conflict. These proposals may not, of course, completely satisfy all parties, but you will recognise with us that at this supreme moment in Indian history statesmanship demands mutual accomodation.

We ask you to consider the alternative to acceptance of these proposals. After all the efforts which we and the Indian Parties have made together for agreement, we must state that in our view there is small hope of peaceful settlement by agreement of the Indian Parties alone. The alternative would therefore be a grave danger of violence, chaos, and even civil war. The result and duration of such a disturbance cannot be foreseen; but it is certain that it would be a terrible disaster for many millions of men, women and children. This is a possibility which must be regarded with equal abhorrence by the Indian people, our own countrymen, and the world as a whole.

We therefore lay these proposals before you in the profound hope that they will be accepted and operated by you in the spirit of accommodation and goodwill in which they are offered. We appeal to all who have the future good of India at heart to extend their vision beyond their own community or interest to the interests of the whole four hundred millions of the Indian people.

We hope that the new independent India may choose to be a member of the British Commonwealth. We hope in any event that you will remain in close and friendly association with our people. But these are matters for your own free choice. Whatever that choice may be we look forward with you to your ever-increasing prosperity among the great nations of the world, and to a future even more glorious than your past.

APPENDIX II

His Majesty's Government's Statement of June 6, 1946.

"The main difficulty that has arisen has been over interpretation of Para 19 (5) and (8) of the Cabinet Mission's statement of May 16, relating to meetings in sections, which runs as follows:

"Para 19 (5) :—These sections shall proceed to settle provincial constitutions for the provinces included in each section and shall also decide whether any group constitution shall be set up for those provinces and if so, with what provincial subjects the group should deal. Provinces should have power to opt out of the groups in accordance with the provisions of Sub-Clause (8) below.

"Para 19 (8) :—As soon as the new constitutional agreements have come into operation, it shall be open to any province to elect to come out of any group in which it has been placed. Such a decision shall be taken by the legislature of the province after the first general election under the new Constitution".

"The Cabinet Mission have throughout maintained the view that the decisions of the sections should, in the absence of an agreement to the contrary, be taken by a simple majority of votes of the representatives in the sections. This view has been accepted by the Muslim League, but the Congress have put forward a different view. They have asserted that the true meaning of the statement, read as a whole, is that the provinces have the right to decide both as to grouping and as to their own constitutions.

"HMG have had legal advice which confirms that the statement of May 16 means what the Cabinet Mission have

always stated was their intention. This part of the statement, as so interpreted, must, therefore, be considered an essential part of the scheme of May 16 for enabling the Indian people to formulate a constitution which HMG would be prepared to submit to Parliament. It should, therefore, be accepted by all parties in the Constituent Assembly.

"It is, however, clear that other questions of interpretation of the statement of May 16 may arise and HMG hope that if the Council of the Muslim League are able to agree to participate in the Constituent Assembly. they will also agree, as have the Congress, that the Federal Court should be asked to decide matters of interpretation that may be referred to them by either side and will accept such a decision, so that the procedure, both in the Union Constituent Assembly and in the sections, may accord with the Cabinet Mission's plan.

"On the matter immediately in dispute. HMG urge the Congress to accept the view of the Cabinet Mission in order that a way may be opened for the Muslim League to reconsider their attitude. If in spite of this reaffirmation of the intention of the Cabinet Mission the Constituent Assembly desires that this fundamental point should be referred for a decision to the Federal Court. such reference should be made at a very early date. It will then be reasonable that the meetings of the sections of the Constituent Assembly should be postponed until the decision of the Federal Court is known.

"There has never been any prospect of success for the Constituent Assembly except upon the basis of agreed procedure. Should the constitution come to be framed by a Constituent Assembly in which a large section of the Indian population had not been represented, HMG could not, of course, contemplate—as the Congress have stated they would not contemplate—forcing such a constitution upon any unwilling parts of the country".

APPENDIX III

Text of Mr. Attlee's Statement, 20th Feb., 1947.

The following is the full text of Mr. Attlee's statement:

"It has long been the policy of successive British Governments to work towards the realization of self-government in India. In pursuance of this policy, an increasing measure of responsibility has been devolved on Indians, and to-day the civil administration and the Indian Armed Forces rely to a very large extent on Indian civilians and officers. In the constitutional field the Acts of 1919 and 1935, passed by the British Parliament, each represented a substantial transfer of political power. In 1940 the Coalition Government recognized the principle that Indians should themselves frame a new constitution for a fully autonomous India, and in the offer of 1942 they invited them to set up a Constituent Assembly for this purpose as soon as the war was over.

"HMG believe this policy to have been right and in accordance with sound democratic principles. Since they came into office, they have done their utmost to carry it forward to its fulfilment. The declaration of the Prime Minister on March 15 last, which met with general approval in Parliament and the country, made it clear that it was for the Indian people themselves to choose their future status and constitution, and that, in the opinion of HMG, the time had come for responsibility for the Government of India to pass into Indian hands.

"The Cabinet Mission, which was sent to India last year, spent over three months in consultation with Indian leaders in order to help them to agree upon a method for determining the future constitution of India, so that the transfer of

power might be smoothly and rapidly effected. It was only when it seemed clear that, without some initiative from the Cabinet Mission, agreement was unlikely to be reached that they put forward proposals themselves.

"These proposals, made public in May last, envisaged that the future constitution of India should be settled by a Constituent Assembly composed, in the manner suggested therein, of representatives of all communties and interests in British India and of the Indian States.

"Since the return of the Mission, an Interim Government has been set up at the Centre, composed of the political leaders of the major communities, exercising wide powers within the existing constitution. In all the provinces, Indian Governments resposible to legislatures are in office.

"It is with great regret that HMG find that there are still differences among Indian parties which are preventing the Constituent Assembly from functioning as it was intended that it should. It is of the essence of the plan that the Assembly should be fully representative.

"HMG desire to hand over their responsibility to authorities established by a constitution approved by all parties in India in accordance with the Cabinet Mission's plan. But, unfortunately, there is at present no clear prospect that such a constitution and such authorities will emerge. The present state of uncertainty is fraught with danger, and cannot be indefinitely prolonged. HMG wish to make it clear that it is their definite intention to take necessary steps to effect the transference of power to responsible Indian hands by a date not later than June, 1948.

"This great sub-continent now containing over 400 million people has, for the last century, enjoyed peace and security as a part of the British Commonwealth and Empire. Continued peace and security are more than ever necessary today if the full possibilities of economic development are

to be realized and a higher standard of life attained by the Indian people.

"HMG are anxious to hand over their responsibilities to a Government which, resting on the sure foundation of the support of the people, is capable of maintaining peace and administering India with justice and efficiency. It is, therefore, essential that all parties should sink their differences in order that they may be ready to shoulder the great responsibilities which will come upon them next year.

"After months of hard work by the Cabinet Mission, a great measure of agreement was obtained as to the method by which a constitution should be worked out. This was embodied in their statement of May last. HMG then agreed to recommend to Parliament a constitution worked out in accordance with the proposals made therein by a fully representative Constituent Assembly. But if it should appear that such a constitution will not have been worked out by fully representative Assembly before the time mentioned in Paragraph 7 (June, 1948) HMG will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in such other way as may seem most reasonable and in the best interests of the Indian people.

"Although the final transfer of authority may not take place until June, 1948, preparatory measures must be put in hand in advance. It is important that the efficiency of the civil admnistration should be maintained and that the defence of India should be fully provided for. But inevitably as the process of transfer proceeds it will become progressively more difficult to carry out to the letter all the provisions of the Government of India Act, 1935. Legislation will be introduced in due course to give effect to the final transfer of power.

"In regard to the Indian States, as was explicity stated by the Cabinet Mission, HMG do not intend to hand over their powers and obligations under Paramountcy to any Government of British India. It is not intended to bring Paramountcy, as a system, to a concluson earlier than the date of the final transfer of power, but it is contemplated that, for the intervening period, the relations of the Crown with individual States may be adjusted by agreement.

"HMG will negotiate agreements in regard to matters arising out of the transfer of power with representatives of those to whom they propose to transfer power.

"HMG believe that British commercial and industrial interests in India can look forward to a fair field for their enterprise under the new conditions. The commercial connexion between India and the United Kingdom has been long and friendly and will continue to be to their mutual advantage.

"HMG cannot conclude this statement without expressing on behalf of the people of this country, their goodwill and good wishes towards the people of India as they go forward to this final stage in their achievement of self-government. It will be the wish of everyone in these islands that, notwithstanding constitutional changes, the association of the British and Indian peoples should not be brought to an end, and they wll wish to continue to do all that is in their power to further the well-being of India.

"The House will wish to know of an announcement which is being made public today. FM the Rt Hon. Viscount Wavell was appointed Viceroy in 1943. After having held high military command in the Middle East, S-E Asia and India with notable distinction since the begining of the war. It was agreed that this should be a war-time appointment. Lord Wavell has discharged this high office during this very difficult period with devotion and a high

sense of duty. It has, however, seemed that the opening of a new and final phase in India is an appropriate time to terminate this war appointment.

"His Majesty has been pleased to approve, as successor to Lord Wavell, the appointment of Adm. the Viscount Mountbatten, who will be entrusted with the task of transferring to Indian hands responsibility for the government of British India in a manner that will best ensure the future happiness and prosperity of India. The change of office will take place during March. The House will be glad to hear that His Majesty has been pleased to approve the conferment of an Earldom on Viscount Wavell.

"Viscount Mountbatten will remain on the active list in accordance with his wishes that his future employment in the Royal Navy shall not be prejudiced.

"I am sure the House will wish him well in his task. The change of office will take place during March."

APPENDIX IV.

Announcement of June 3, 1947.

1. On Feb. 20, 1947, HMG announced their intention of transferring power in British India to Indian hands by June, 1948. HMG had hoped that it would be possible for the major parties to co-operate in the working out of the Cabinet Mission's Plan of May 16, 1946, and evolve for India a Constitution acceptable to all concerned. This hope has not been fulfilled.

2. The majority of the representatives of the provinces of Madras, Bombay, the U.P., Bihar, C.P. and Berar, Assam, Orrisa and the N.W.F.P. and the representatives of Delhi, Ajmer-Merwara and Croog have already made progress in the task of evolving a new Constitution. On the other hand, the Muslim League Party, including in it a majority of the representatives of Bengal, the Punjab and Sind as also the representative of British Baluchistan, has decided not to participate in the Constituent Assembly.

3. It has always been the desire of HMG that power should be transferred in accordance with the wishes of the Indian people themselves. This task would have been greatly facilitated if there had been agreement among the Indian political parties. In the absence of such an agreement, the task of devising a method by which the wishes of the Indian people can be ascertained has devolved on HMG. After full consultation with political leaders in India, HMG have decided to adopt for this purpose the Plan set out below. HMG wish to make it clear that they have no intention of attempting to frame any ultimate Constitution for India; this is a matter for the Indians themselves. Nor is

there anything in this Plan to preclude negotiations between communities for a united India.

4. It is not the intention of HMG to interrupt the work of the existing Constituent Assembly. Now that provision is made for certain provinces specified below, HMG trust that, as a consequence of this announcement, the Muslim League representatives of those provinces a majority of whose representatives are already participating in it will now take their due share in its labours. At the same time, it is clear that any Constitution framed by this Assembly cannot apply to those parts of the country which are unwilling to accept it. HMG are satisfied that the procedure outlined below embodies the best practical method of ascertaining the wishes of the people of such areas on the issue whether their Constitution is to be framed in the existing Constituent Assembly, or in a new and separate Constituent Assembly consisting of the representatives of those areas which decide not to participate in the existing Constituent Assembly. When this has been done, it will be possible to determine the authority or authorities to whom power should be transferred.

5. The provincial Legislative Assemblies of Bengal and the Punjab (excluding the European members) will therefore each be asked to meet in two parts, one representing the Muslim majority districts and the other the rest of the province. For the purpose of determining the population of districts, the 1941 census figures will be taken as authoritative. The Muslim majority districts in these two provinces are set out in the appendix to this announcement.

6. The members of the two parts of each Legslative Assembly sitting separately will be empowered to vote whether or not the province should be partitioned. If a simple majority of either part decides in favour of partition, division will take place and arrangements will be made accordingly.

7. Before the question as to partition is decided, it is

desirable that the representatives of each part should know in advance which Constituent Assembly the province as a whole would join in the event of the two parts subsequently deciding to remain united. Therefore, if any member of either Legislative Assembly so demands, there shalll be held a meeting of all members of the Legislative Assembly (other than Europeans) at which a decision will be taken on the issue as to which Constituent Assembly the province as a whole would join if it were decided by the two parts to remain united.

8. In the event of partition being decided upon, each part of the Legislative Assembly will, on behalf of the areas they represent, decide which of the alternatives in part 4 above to adopt.

9—For the immediate purpose of deciding on the issue of partition, the members of the Legislative Assemblies of Bengal and the Punjab will sit in two parts according to Muslim majority districts (as laid down in the appendix) and non-Muslim majority districts. This is only a preliminary step of a purely temporary nature as it is evident that for the purpose of a final partition of these provinces a detailed investigation of boundary questions will be needed; and as soon as a decision involving partition has been taken for either province, a Boundary Commission will be set up by the Governor-General, the membership and terms of reference of which will be settled in consultation with those concerned. It will be instructed to demarcate the boundaries of the two parts of the Punjab on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims. It will also be instructed to take into account other factors. Similar instructions will be given to the Bengal Boundary Commission. Until the report of a Boundary Commission has been put into effect, the provisional boundaries indicated in the appendix will be used.

10—The Legislative Assembly of Sind (excluding the

European members) will at a special meeting also take its own decision on the alternatives in para. 4 above.

11—The position of NWFP is exceptional. Two of the three representatives of this province are already participating in the existing Constituent Assembly. But it is clear in view of its geographical situation, and other considerations, that if the whole or any part of the Punjab decides not to join the existing Constituent Assembly, it will be necessary to give the NWFP an opportunity to reconsider its position. Accordingly, in such an event, a referendum will be made to the electors of the present Legislative Assembly in the NWFP to choose which of the alternatives mentioned in para. 4 above they wish to adopt. The referendum will be held under the aegis of the Governor-General and in consultation with the Provincial Government.

12—British Baluchistan has elected a member but he has not taken his seat in the existing Constituent Assembly. In view of its geographical situation, this province will also be given an opportunity to reconsider its position and to choose which of the alternatives in para. 4 above to adopt. H.E. the Governor-General is examining how this can most appropriately be done.

13—Though Assam is predominantly a non-Muslim province, the district of Sylhet which is contiguous to Bengal is predominantly Muslim. There has been a demand that, in the event of the partition of Bengal, Sylhet should be amalgamated with the Muslim part of Bengal. Accordingly, if it is decided that Bengal should be partitioned, a referendum will be held in Sylhet district under the aegis of the Governor-General and in consultation with the Assam Provincial Government to decide whether the district of Sylhet should continue to form part of the Assam province or should be amalgamated with the new province of Eastern Bengal, if that Province agrees. If the referendum results in favour of amalgamation with Eastern Bengal, a Boundary Commis-

sion with terms of reference similar to those for the Punjab and Bengal will be set up to demarcate the Muslim majority areas of Sylhet district and contiguous Muslim majority areas of adjoining districts, which will then be transferred to Eastern Bengal. The rest of the Assam province will in any case continue to participate in the proceedings of the existing Constituent Assembly.

14—If it is decided that Bengal and the Punjab should be partitioned, it will be necessary to hold fresh elections to choose their representatives on the scale of one for every million of population according to the principle contained in the Cabinet Mission's Plan of May 16, 1946. Similar elections will also have to be held for Sylhet in the event of its being decided that this district should form part of East Bengal. The number of representatives to which each area would be entitled is as follows:—

Province	General	Muslims	Sikhs	Total
Sylhet District	1	2	Nil	3
West Bengal	15	4	Nil	19
East Bengal	12	29	Nil	41
West Punjab	3	12	2	17
East Punjab	6	4	2	12

15—In accordance with the mandates given to them, the representatives of the various areas will either join the existing Constituent Assembly or form the new Constituent Assembly.

16—Negotiations will have to be initiated as soon as possible on administrative consequences of any partition that may have been decided upon:—

(a)—Between the representatives of the respective successor authorities about all subjects now dealt with by the Central Government including Defence, Finance and Communications.

(b)—Between different successor authorities and HMG for treaties in regard to matters arising out of the tansfer of power.

(c)—In the case of provinces that may be partitioned as to administration of all provincial subjects such as the division of assets and liabilities, the police and other services, the High Courts, provincial institutions, etc.

17—Agreements with tribes of the NWF of India will have to be negotiated by the appropriate successor authority.

18—HMG wish to make it clear that the decisions announced above relate only to British India and that their policy towards Indian States contained in the Cabinet Mission Memorandum of May 12, 1946, remains unchanged.

19—In order that the successor authorities may have time to prepare themselves to take over power, it is important that all the above process should be completed as quickly as possible. To avoid delay, the different provinces or parts of provinces will proceed independently as far as practicable within the conditions of this Plan. The existing Constituent Assembly and the new Constituent Assembly (if formed) will proceed to frame Constitutions for their respective territories; they will of course be free to frame their own rules.

20—The major political parties have repeatedly emphasised their desire that there should be the earliest possible transfer of power in India. With this desire HMG are in full sympathy and they are willing to anticipate the date June 1948 for the handing over of power by the setting up of an independent Indian Government or Governments at an even earlier date. Accordingly, as the most expeditious, and indeed the only practicable way of meeting this desire, HMG proposes to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according

to the decisions taken as a result of this announcement. This will be without prejudice to the right of the Indian Constituent Assemblies to decide in due course whether or not the part of India in respect of which they have authority will remain within the British Commonwealth.

21—H.E. the Governor-General will from time to time make such further announcements as may be necessary in regard to procedure or any other matters for carrying out the above arrangements.

APPENDIX

Muslim majority districts of Punjab and Bengal according to 1941 census.

1—**Punjab**:—

Lahore Division: Gujranwala, Gurdaspur, Lahore, Sheikhpura, Sialkot.

Rawalpindi Division: Attock, Gujrat, Jhelum, Mianwali, Rawalpindi, Shahpur.

Multan Division: Dera Ghazi Khan, Jhang, Lyallpur, Montgomery, Multan, Muzaffargarh.

2.—**Bengal**:—

Chittagong Division: Chittagong, Noakhali, Tippera.

Dacca Division: Bakarganj, Dacca, Faridpur, Mymensingh.

Presidency Division: Jessore, Murshidabad, Nadia.

Rajshahi Division: Bogra, Dinajpur, Malda, Pabna, Rajshahi, Rangpur.

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